92-552

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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

v.

GULF + WESTERN INDUSTRIES, INC.,
GULF + WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Controls in a Case Where Relief Under Title VII is Unavailable to the Plaintiff?

B. Whether the Civil Rights Act of 1991 Should be Applied Retroactively?

C. Whether This Court Should Allow the Subjection of an Arbitrary Class of Innocent Parties to Manifest Injustice?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, Joe Allen Baker, M.D., and respondents, GULF + WESTERN INDUSTRIES, INC., GULF + WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., and FRANK B. HALL, INC. The same parties are before this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

PARTIES TO THE PROCEEDING. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED. 2

STATEMENT OF THE CASE. 4

HISTORY OF THE CASE. 11

REASONS FOR GRANTING THE PETITION. . 13

I. THIS COURT SHOULD CLARIFY WHETHER ITS DECISION IN PATTERSON v. McLEAN CREDIT UNION APPLIES WITH FULL FORCE IN THOSE CASES WHERE RELIEF IS UNAVAILABLE TO PLAINTIFFS UNDER TITLE VII 14

II. THIS COURT SHOULD DETERMINE WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETRO-ACTIVELY. 22

A. This Court Should Resolve Its Differing Lines of Authority Regarding the Application of New Statutes to Pending Cases. 24

TABLE OF CONTENTS
(continued)

B. This Court Should Resolve the Differing Approaches Taken by the Lower Courts in Applying the Civil Rights Act of 1991 to Pending Cases 29

C. The Civil Rights Act of 1991 Should be Applied Retroactively Because Congress Has Not Directed Otherwise and Because Such Application is Consistent With the Law in Effect at the Time of the Challenged Conduct 33

III. REFUSAL TO APPLY THE ACT RETROACTIVELY WOULD ARBITRARILY WORK A MANIFEST INJUSTICE UPON INNOCENT PARTIES 39

CONCLUSION 42

TABLE OF AUTHORITIES

CASES PAGE

Baker v. Gulf & Western Industries, Inc., 850 F.2d 1480 (11th Cir. 1988) . . 11

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). 28

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974). . . 27,33, passim

Bristow v. Drake Street, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1367 (N.D. Ill. 1992). . . . 30

Burchfield v. Derwinski, 782 F.Supp. 532 (D. Colo. 1992). . 31

Davis v. Tri-State Mack Distributions Inc., 57 Fair Empl. Prac. Cas. (BNA) 1025 (E.D. Ariz. 1991) . . . 30

Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985) . . 40

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). . . 31

Grahm v. Bodine Elec. Co., 782 F.Supp. 74 (N.D. Ill. 1992). . 30

TABLE OF AUTHORITIES
(continued)

CASES PAGE

Grubb v. W.A. Foote Memorial Hosp., 533 F.Supp. 671 (E.D. Mich. 1981), aff'd, 759 F.2d 546 (6th Cir.), cert. denied, 479 U.S. 946 (1985). 39

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) . . . 36

Hansel v. Public Serv. Co., 778 F.Supp. 1126 (D. Colo. 1992) . 31

Hernandez v. Hill Country Tel. Coop., Inc., 849 F.2d 139 (5th Cir. 1988) . . . 39

High v. Broadway Indus., Inc., 57 Fair Empl. Prac. Cas. (BNA) 1159 (W.D. Mo. 1992) 32

Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986). . . 39

James v. American Intl. Recovery, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1226 (N.D. Ga. 1991) 32

Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) . . . 15

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). 15,17

TABLE OF AUTHORITIES
(continued)

CASES PAGE

Johnson v. Rice,
58 Fair Empl. Prac. Cas.
(BNA) 31 (S.D. Ohio 1992). 32

Johnson v. Uncle Ben's, Inc.
965 F.2d 1363 (5th Cir. 1992). . . 31

Kaiser Aluminum & Chemical Corp.
v. Bonjorno,
494 U.S. 827 (1990). 29

Khandelwal v. Compuadd Corp.,
780 F.Supp. 1077 (E.D. Va. 1992) . 31

King v. Shelby Medical Ctr.,
779 F.Supp. 157 (N.D. Ala. 1991) . 30

Krijn v. Pogue Simone Real
Estate Co.,
752 F.Supp. 102 (S.D.N.Y. 1990),
affirmed, sub nom. Krijn v. Simone,
930 F.2d 910 (2d Cir. 1991). . . . 19

La Cour v. Harris Co.,
57 Fair Empl. Prac. Cas.
(BNA) 622 (S.D. Tex. 1991) 30

Liotta v. National Forge Co.,
629 F.2d 903 (3d Cir. 1980),
cert. denied, 451 U.S. 970 (1981). 39

TABLE OF AUTHORITIES
(continued)

CASES PAGE

Lucero v. Beth Israel Hospital,
479 F.Supp. 452 (D. Colo. 1979). . 37

Malhotra v. Cotter & Co.,
885 F.2d 1305 (7th Cir. 1989). . . 34

Metrocare v. WMATA,
679 F.2d 922 (D.C. Cir. 1982). . . 40

Mozee v. American Commercial
Marine Service Co.,
963 F.2d 929 (7th Cir. 1992),
pet. for cert. filed, No. 92-248,
61 U.S.L.W. 3150 (Aug. 5, 1992). 14,
24,31

New Orleans City Park Improvement
Assn. v. Detiege,
252 F.2d 122 (5th Cir.), aff'd,
358 U.S. 54 (1958) 15

Patterson v. American Tobacco Co.,
535 F.2d 257 (4th Cir. 1976) . . . 39

Patterson v. McLean Credit Union,
491 U.S. 164 (1989). . . . 12, passim

Richards v. New York City
Bd. of Educ.,
668 F.Supp. 259 (S.D.N.Y. 1987),
aff'd mem., 842 F.2d 1288
(2d Cir. 1988) 39

TABLE OF AUTHORITIES
(continued)

CASES PAGE

Rowe v. Sullivan,
967 F.2d 186 (5th Cir. 1992) . . . 31

Rowlett v. Anheuser-Busch, Inc.,
832 F.2d 194 (1st Cir. 1987) . . . 39

Runyon v. McCrary,
427 U.S. 160 (1976). . . 15,19,20,41

Satterwhite v. Smith,
744 F.2d 1380 (9th Cir. 1984). . . 40

Scott v. Eversole Mortuary,
522 F.2d 1110 (9th Cir. 1975). . . 15

Scott v. Young,
307 F.Supp. 1005 (E.D. Va. 1969),
aff'd, 421 F.2d 143 (4th Cir.),
cert. denied, 398 U.S. 929 (1970). 15

Stallworth v. Shuler,
777 F.2d 1431 (11th Cir. 1985) . . 40

Stender v. Lucky Stores, Inc.,
780 F.Supp. 1302 (N.D. Cal. 1992). 30

Taylor v. Jones,
653 F.2d 1193 (8th Cir. 1981). . . 39

Thorpe v. Housing Authority
of Durham,
393 U.S. 268 (1969). 26

TABLE OF AUTHORITIES
(continued)

CASES PAGE

United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928). 28

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) . .25,28

Van Meter v. Barr, 778 F.Supp. 83 (D.D.C. 1991) . . . 31

Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) . . . 31

STATUTES

28 U.S.C. 1254(1) 2

28 U.S.C. 1291. 2

28 U.S.C. 1343. 2

42 U.S.C. 1981. . . . . 2, passim

42 U.S.C. 2000e et seq. (Title VII) 15, passim

Civil Rights Act of 1991, 402(a). . 3, passim

Fla. Stat. ch. 440.13 (1979) 5

TABLE OF AUTHORITIES
(continued)

MISCELLANEOUS — PAGE

H. Rep. No. 102-40(I), 102d Cong., 1st Sess., reprinted in 1991 U.S. CODE CONG. & AD. NEWS 549 24

H. Rep. No. 102-40(II), 102d Cong., 1st Sess., reprinted in 1991 U.S. CODE CONG. & AD. NEWS 694 24

Joan Biskupic, Job Discrimination Legislation Roils Business Community, 49 Cong. Q. 989 (1991) 34

Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). . . . 38

Joe Allen Baker, M.D., respectfully petitions this Court to issue a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The denial of rehearing by the Court of Appeals for the Eleventh Circuit is unreported and is reprinted in the Appendix hereto ["App."], at ix. The unreported decision by the Court of Appeals for the Eleventh Circuit affirming the district court is reprinted in App. at ii.

The Final Judgment of the U.S. District Court for the Southern District of Florida, the Hon. Norman C. Roettger, Jr., presiding (Case No. 88-8188-CIV-ROETTGER), is unpublished and is printed in App. at xii. The unpublished Order of the district court granting summary

judgment in favor of defendants is printed in App. at iv.

JURISDICTION

Jurisdiction in the U.S. District Court for the Southern District of Florida was predicated upon 28 U.S.C. §1343, as Plaintiff-Petitioner claims that Defendants-Respondents have violated his civil rights protected by 42 U.S.C. §1981.

An appeal to the Eleventh Circuit was taken pursuant to 28 U.S.C. §1291. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case implicates 42 U.S.C. §1981, which provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same

> right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) Definition
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1981 (as amended by the Civil Rights Act of 1991).

STATEMENT OF THE CASE

Petitioner Joe Allen Baker is a white male who practiced medicine in Belle Glade, Florida, and who for many years treated Gulf + Western's ["G&W's"] domestic and foreign employees for job-related injuries. G&W Statement of Material Facts, R7-246. G&W annually employed several thousand seasonal sugar cane cutters imported to the United States under limited work visas through the British West Indies Central Labor Organization. Id. Virtually all of these workers, known as "BWIs," were black men from the Caribbean.

For years, Dr. Baker was paid in one manner for domestic workers and in another manner for BWIs. Baker

Affidavit 5.[1] The pay scale for the medical services provided to domestic employees was in accordance with the Florida workers' compensation schedule, which required that an "individual health-care provider . . . be paid either his usual and customary charge for a treatment or service, or the maximum charge, which ever is less." Fla. Stat. ch. 440.13 (1979). The pay scale for providing medical services to BWIs, however, was a flat rate, regardless of whether the medical service was a simple office visit or an amputation. Dr. Baker was told that the flat rate (or "contract medical rate"), would simplify the payment process for medical services to the BWIs. Baker

[1] Dr. Baker's affidavit was included, along with other affidavits and depositions, in the Appendix to Plaintiff's Response to Defendants' Motions for Summary Judgment.

Affidavit 5.

Each year, a new contract for medical services would be negotiated at the end of the sugar cane growing season, i.e., during the summer, in anticipation of the next season, which would begin in September or October. R6-231-85. These new contracts were usually oral and were confirmed by a handshake. R6-231-82.

Over the years, Dr. Baker came to believe that the contract medical rate for the BWIs was not motivated by a desire for efficiency, but rather was part of a pattern of racial discrimination by the employers against the black BWIs. Baker Affidavit 9. He had noted the general trend toward mistreatment of BWIs in working conditions, housing, food and other conditions of employment. Id. at 3. By

1978, the contract medical rate was only one-half the average rate for domestic employees, id., yet the injuries sustained by the BWIs (who worked in the fields with machetes), were generally more severe than those of the domestic employees (who did not). Id. at 6.

Dr. Baker complained to G&W and other companies about the use of the BWI flat rate. Id. at 6, 9. In late 1978, he contracted with another sugar company that, beginning January 1979, medical services for both domestic and BWI employees would be billed in accordance with the workers' compensation fee schedule. Id. at 9-10. Dr. Baker informed G&W that he would commence billing them in the same manner. Id. at 10-11. Beginning in January 1979, he began billing G&W for medical services for the BWIs under the workers'

compensation fee schedule, just as he did for domestic employees. Id. at 10.

In April of 1980, Palmer Pierce, a representative of Risk Management Services ["RMS"] (the claims administrator for G&W), met with Dr. Baker to discuss his billings for the past season, which had not yet been paid. R6-231-30 to 32; see also Risk Management Services' Statement of Material Facts ["RMS Facts"], R8-254-1. This meeting was motivated in part by an audit G&W had performed with respect to RMS, which was critical of RMS's efficiency. RMS Facts, R8-254-2. At that meeting, Pierce informed Dr. Baker that the relationship among Baker, RMS, and G&W was good, and that the quality of Baker's medical care was good, but that the basic problem involved the amount of his bills for services to the

BWIs. R6-231-34-38. Due to Dr. Baker's refusal to bill medical care for BWIs at a lower rate than for domestic employees, the average cost of his treatment of BWIs was 25% to 30% above the average charged by other physicians. RMS wanted Baker to return to the flat rate method for BWIs while remaining at the higher workers' compensation rate for domestic workers. R6-231-38-39.

In the summer of 1980, Dr. Baker met with Tony Alvarez (assistant general manager of G&W's Okeelanta sugar mill), a Mr. Corrhia, and a man later identified as Richard Sanchez (a vice-president of G&W). See R7-240. Dr. Baker believed that Sanchez was at the meeting to approve a new contract for the next crop season, and that he did so; G&W has denied that Sanchez had such

authority.[2] R10-285-12 to 17. Dr. Baker reaffirmed that he would not enter into a new contract containing the flat rate for BWIs. R10-285-27.

Thereafter, G&W contracted with another physician, Dr. Raul Ramos, to provide the treatment for its employees. G&W Facts, R8-254-3-2. At the time, Dr. Baker believed that a new contract had been authorized, and was never informed

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[2] The district court incorrectly found: "The allegations of Plaintiff's complaint do not relate to the making or enforcement of contracts but to conduct by the Defendant GULF WESTERN INDUSTRIES after the contract relation had been established." App. at vi.

In fact, there was a material dispute as to whether a new contract had been entered. G&W has consistently denied that it entered into a new contract with Dr. Baker for the 1980-81 growing season. See R14-359-13 (Transcript of Hearing on Summary Judgment) (Counsel for G&W: "This defendant, we will concede, denied in his Answer that there was a contract.").

Thus the district court erred in granting summary judgment on these disputed material facts.

otherwise. Baker Affidavit 11. The first time he heard there had been a change was in September when he was informed that G&W patients were going to Dr. Ramos. Id.

Dr. Baker contends that G&W's failure to enter into a new contract with him was the result of his refusal to agree to a flat rate for the BWIs.

HISTORY OF THE CASE

Dr. Baker filed his complaint on April 4, 1984, see Record, Vol. 1, docket entry #1 [R1-1]. The District Court originally dismissed Dr. Baker's §1981 claim as untimely. R1-13, 16. The Eleventh Circuit reversed and remanded. See Baker v. Gulf & Western Industries, Inc., 850 F.2d 1480 (11th Cir. 1988).

On remand, both sets of Defendants moved for summary judgment. R7-237, R8-

256. The parties filed extensive appendices, including numerous depositions and affidavits. R7-243; R10-285 to 287; R11-288 to 295.

After the Defendants' motions for summary judgment had been filed, but before the hearing on those motions, Dr. Baker moved to amend his complaint. R13-319. Defendant G&W opposed that motion, R13-322, and Dr. Baker filed a lengthy response to G&W's opposition, R13-322, 325. The District Court held a hearing on Defendants' motions for summary judgment. R14. With respect to Dr. Baker's §1981 claim, the District Court relied upon Patterson v. McLean Credit Union, 491 U.S. 164 (1989), and granted summary judgment in favor of Defendants. R13-327. The District Court later entered a final judgment, which also denied Dr. Baker's motion to

amend his complaint. R13-330.

Dr. Baker timely filed a Notice of Appeal. R13-353. On April 17, 1992, a panel of the Eleventh Circuit, without issuing an opinion, affirmed the District Court's judgment. See App. at ii. The Eleventh Circuit denied Baker's motion for rehearing on June 26, 1992.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve three important issues. First, this Court should clarify the extent of its holding in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Second, this Court should examine the interaction between that decision and the Civil Rights Act of 1991, passed by Congress to overrule Patterson. Specifically, this Court should determine whether the 1991 Act should be applied retroactively. The

issue of retroactivity is also presented to this Court in another petition now pending before this Court. See Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992). Finally, this Court should refuse to allow the subjection of an arbitrary class of innocent parties to manifest injustice.

I. THIS COURT SHOULD CLARIFY WHETHER ITS DECISION IN PATTERSON v. McLEAN CREDIT UNION APPLIES WITH FULL FORCE IN THOSE CASES WHERE RELIEF IS UNAVAILABLE TO PLAINTIFFS UNDER TITLE VII

As Dr. Baker cannot maintain an action under Title VII, Patterson v. McLean Credit Union, 491 U.S. 164 (1989), does not require that he be denied relief for postformation conduct under §1981.

In Patterson, this Court addressed the issue of the interaction between 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. That issue was framed within the narrow context of an employee's claim which could, at least prior to Patterson, have been brought under either §1981 or Title VII.[3]

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[3] Admittedly, many cases claiming violations of §1981 arise from claims of racial discrimination in employment. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

However, employment claims do not constitute the universe of possible §1981 actions. See, e.g., Runyon v. McCrary, 427 U.S. 160, 167 (1976) (contracts for education services by private schools); Scott v. Young, 307 F.Supp. 1005 (E.D. Va. 1969), aff'd, 421 F.2d 143 (4th Cir.), cert. denied, 398 U.S. 929 (1970) (§1981 prohibits discrimination by private recreational facilities); New Orleans City Park Improvement Assn. v. Detiege, 252 F.2d 122 (5th Cir.), aff'd, 358 U.S. 54 (1958) (§1981 bars discriminatory denial of equal access to public park); Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) (same for equal access to public street); Scott v. Eversole

Justice Kennedy's opinion for the majority reasoned that an employer's discriminatory conduct during employment, "reprehensible though it be if true, is not actionable under §1981 . . . . Rather, such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964." Patterson, 491 U.S. at 179-80. The majority added:

> Interpreting §1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract, such as incidents related to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.

Id. at 180 (emphasis added).

Mortuary, 522 F.2d 1110 (9th Cir. 1975) (refusal to provide funeral for Native American actionable under §1981).

After a discussion of the "elaborate administrative procedure" utilized by the Equal Employment Opportunity Commission in administering Title VII, the Patterson Court took pains to note: "Where conduct is covered by both §1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter. . . . [W]here the statutes do in fact overlap we are not at liberty 'to infer any positive preference for one over the other'." Id. at 181 (emphasis added), quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

Implicit in the language emphasized above is the realization that some conduct is covered by one statute but not by the other. Thus, Patterson held that §1981 did not, within the context of an employment contract, prohibit

racial discrimination after the making of that contract. Patterson did not, however, hold that §1981 was inapplicable to postformation discriminatory conduct in the context of some other type of contract.

Indeed, even in the portion of the Patterson opinion interpreting the scope of §1981's coverage, this Court reasoned that the right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." Patterson, 491 U.S. at 176 (emphasis added). Thus, this Court's rationale in Patterson simply cannot be divorced from the narrow context -- contracts of employment -- presented in that case.

As a result, the Patterson rationale does not control a §1981 case

-- such as the instant one -- involving claims which cannot be brought under Title VII. Dr. Baker could not avail himself of the protections available under Title VII, because he was not an employee of the Defendants. He was an independent, professional contractor, who contracted with G&W to provide medical services; as such, he was the antithesis of the class -- "employees" -- which Congress sought to protect by enacting Title VII. See 42 U.S.C. §2000e(f); Krijn v. Pogue Simone Real Estate Co., 752 F.Supp. 102, 104-05 (S.D.N.Y. 1990), affirmed sub nom. Krijn v. Simone, 930 F.2d 910 (2d Cir. 1991) (independent contractors are not employees).

This Court's refusal to overrule Runyon v. McCrary, 427 U.S. 160 (1976), is, therefore, extremely significant.

See Patterson, 491 U.S. at 171. Runyon exemplified the precise situation where there is no overlap between Title VII and §1981. The African-American parents in Runyon could not have based their action upon Title VII. No employment contract was at issue. Rather, the contract that the parents sought to make involved the provision of (educational) services. Likewise, in the instant case, the contract Dr. Baker attempted to make involved the provision of (medical) services.

Thus, this Court's refusal to overrule Runyon indicates that §1981's scope could cover postformation conduct in those cases where another statutory remedial scheme is unavailable to an aggrieved plaintiff.

Giving an overly broad reading to Patterson (as the courts below did),

will significantly sacrifice the coverage of the civil rights laws Congress has enacted. Indeed, if this Court's decision in Patterson were construed overly broadly -- to encompass all actions filed under §1981, including those claims not actionable under Title VII -- the lower courts will be faced with precisely the situation this Court sought to avoid. As the Patterson Court reasoned, a narrow reading of §1981 in employment discrimination cases would "preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." Patterson, 491 U.S. at 181-82.

This Court should clarify the limits of Patterson. If the decision of the Eleventh Circuit is allowed to stand, employers will be able to evade both Title VII and §1981 by making their

employees independent contractors, who would then have no protection against postformation discrimination. As a result, it would be impossible to fulfill the worthy purposes of those statutes.

II. THIS COURT SHOULD DETERMINE WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY

If Patterson does apply to the instant case, this Court should determine whether the Civil Rights Act of 1991 applies retroactively, thereby allowing Dr. Baker to seek relief under that Act.

Congress passed the Civil Rights of 1991 to, inter alia, overrule this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The Civil Rights Act of 1991 nullifies Patterson by defining the term "make and enforce contracts" contained in §1981 to

include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. §1981(b).

The Act is silent regarding its application to cases pending on the date of its enactment and to cases which were filed before Patterson was decided. It provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Civil Rights Act of 1991, §402(a).

However, the legislative history suggests that the Bill provisions intended to overrule Patterson were to apply to cases pending on the date of the Supreme Court decisions that the provisions overruled. That is, that the

Act was to have retroactive effect with regard to its amendment of §1981. See H. Rep. No. 102-40(I), 102d Cong., 1st Sess. 94, reprinted in 1991 U.S. CODE CONG. & AD. NEWS 549, 632; H. Rep. No. 102-40(II), 102d Cong., 1st Sess. 38, reprinted in 1991 U.S. CODE CONG. & AD. NEWS 694, 732.

This Court should resolve whether that Act is to be applied retroactively.

A. This Court Should Resolve Its Differing Lines of Authority Regarding the Application of New Statutes to Pending Cases

There are "two seemingly contradictory lines of cases" governing retroactivity from this Court. Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 935 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992). On the one hand, this Court has ordered courts to apply

the law in effect at the time of decision. On the other hand, this Court has refused to apply statutes retroactively in the absence of specific congressional direction.

One line of authority commands courts to apply the law in effect at the time they render a decision. This presumption first arose in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), in which this Court had to decide whether to apply a newly enacted treaty to a pending case. Speaking for the Court, Chief Justice Marshall stated: "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) at 110. Since the treaty expressly

mandated its application to pending cases, Marshall applied the law retroactively. The case, however, did not address whether a change in law could be applied to pending cases if there were no explicit language commanding that effect.

This Court eventually addressed that question in Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). The Thorpe Court held: "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Id. at 281. Under this formulation, pending cases are to be decided under existing law enacted after the accrual of the cause of action. The Court did not distinguish between statutes and administrative regulations. See 393 U.S. at 282.

In Bradley v. School Board of City of Richmond, 416 U.S. 696, 715 (1974), this Court reinforced Thorpe by refusing to hold that changes in the law are to be given retroactive effect only where that is the "clear and stated intention of the legislature." Instead, this Court explained: "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Id.

The Bradley Court declared that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. Indeed, the Bradley Court held that when the legislative history supports either

position, there is implicit support for applying the statute to pending cases. Id. at 715-16 & n.23.

Under an alternate line of authority, this Court has suggested that retroactivity is not favored. Under this approach, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). Although Bowen dealt with retroactive rulemaking, this Court applied the canon of construction that "[s]tatutes are not to be given retroactive effect . . . unless the legislative purpose so to do plainly appears." United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928).

This Court itself recently acknowledged that the Bradley and Bowen cases are in "apparent tension," but nonetheless declined to resolve them, holding only that "where the congressional intent is clear, it governs." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).[4]

B. This Court Should Resolve the Differing Approaches Taken by the Lower Courts in Applying the Civil Rights Act of 1991 to Pending Cases

These two seemingly contradictory lines of this Court's precedent have created a muddle in the lower courts. The two conflicting approaches force federal courts faced with the

[4] In refusing to apply the amended statute to the case before it, the Kaiser Aluminum Court concluded that "the plain language of both the original and amended versions of [the statute] is not applicable to judgments entered before its effective date." Id. at 838.

retroactivity issue to choose one presumption over the other. Each of the presumptions has found adherents in the federal courts. Kaiser Aluminum only magnified the irreconcilable nature of the competing doctrines.

The case law interpreting the Civil Rights Act of 1991 reflects the dual approaches. For examples of courts that have applied the act retroactively, see Stender v. Lucky Stores, Inc., 780 F.Supp. 1302 (N.D. Cal. 1992); King v. Shelby Medical Ctr., 779 F.Supp. 157 (N.D. Ala. 1991); Davis v. Tri-State Mack Distributions Inc., 57 Fair Empl. Prac. Cas. (BNA) 1025 (E.D. Ariz. 1991). See also Grahm v. Bodine Elec. Co., 782 F.Supp. 74 (N.D. Ill. 1992); Bristow v. Drake Street, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1367 (N.D. Ill. 1992); La Cour v. Harris Co., 57 Fair Empl. Prac.

Cas. (BNA) 622 (S.D. Tex. 1991).

The Fifth, Sixth, Seventh, and Eighth Circuits have held that at least certain sections of the Act do not apply retroactively. See Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992); Johnson v. Uncle Ben's, Inc. 965 F.2d 1363 (5th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). See also Burchfield v. Derwinski, 782 F.Supp. 532 (D. Colo. 1992); Khandelwal v. Compuadd Corp., 780 F.Supp. 1077 (E.D. Va. 1992); Hansel v. Public Serv. Co., 778 F.Supp. 1126 (D. Colo. 1992); Van Meter v. Barr, 778 F.Supp. 83 (D.D.C. 1991); Johnson v.

Rice, 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D. Ohio 1992); High v. Broadway Indus., Inc., 57 Fair Empl. Prac. Cas. (BNA) 1159 (W.D. Mo. 1992); James v. American Intl. Recovery, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1226 (N.D. Ga. 1991).

These contrasting approaches in statutory construction taken by the federal courts mirror the competing presumptions. A determination of which presumption to apply necessarily reflects that court's approach to statutory construction, which, in turn, reflects the court's view about the role of courts in a tripartite system. The irreconcilable outcomes among the courts reflect the unworkability of the present rules of construction. This Court must determine exactly which construction should be followed.

C. The Civil Rights Act of 1991 Should be Applied Retroactively Because Congress Has Not Directed Otherwise and Because Such Application is Consistent With the Law in Effect at the Time of the Challenged Conduct

Bradley stands for the proposition that laws will be applied retroactively unless Congress directs otherwise or if doing so will result in "manifest injustice." Bradley, 416 U.S. at 711. This Court set forth three methods of identifying manifest injustice that would preclude retroactive application of a law: (1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in law on preexisting rights. See id. at 717.

1. The Nature and Identity of the Parties

This test concerns the relative power and resources of the parties.

While cause for concern would certainly arise if the Act targeted a vulnerable group, the nation's employers hardly qualify as a defenseless entity. Employers expressed a strong voice during the shaping of the Act, and their lobbyists played an integral role in compromise negotiations. See Joan Biskupic, Job Discrimination Legislation Roils Business Community, 49 Cong. Q. 989 (1991). Furthermore, most employers are represented in litigation by experts and corporate counsel. Their resources are generally quite substantial. By contrast, the victims of discrimination often have few if any resources, and often take tremendous risks to pursue claims. See Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (Posner, J.).

Furthermore, the Bradley Court emphasized the difference between "mere private cases between individuals," Bradley, 416 U.S. at 717 (quoting Schooner Peggy, 5 U.S. (1 Cranch) at 110), in which application of a new law to existing claims may be inappropriate, and litigation involving "great national concern," Bradley, 416 U.S. at 719, where application of a new statute to existing claims is presumed, absent clear congressional intent to the contrary. The Bradley Court noted that Title VII was an area of public, rather than private, concern where the plaintiff functions "as a 'private attorney general'; vindicating a policy that Congress considered of the highest priority." 416 U.S. at 718-19 (citation omitted). Similarly, vindicating rights under §1981 places a plaintiff in the

role of a private attorney general. Accordingly, the findings and purposes of the Civil Rights Act of 1991 meet the first test articulated in Bradley.

2. The Nature of The Rights

In Bradley, the Court stated it would refuse to apply an intervening change to a pending action where it had concluded that to do so would infringe upon a right that had vested. 416 U.S. at 720. In this case, the defendant never, even under 1989 case law, had a vested right to discriminate in the delivery of medical services or to enter into racially discriminatory contracts. Furthermore, the procedures and remedies available to plaintiff now are identical to those obtainable when the challenged conduct occurred. Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) (§1981 applies to postformation contract

conduct); Lucero v. Beth Israel Hospital, 479 F.Supp. 452, 453-55 (D. Colo. 1979) (same). See also cases cited in note 5, infra. Therefore, the nature of the defendant's rights has not changed.

3. Nature of the Impact of the Change of the Law Upon Those Rights

The Civil Rights Act of 1991, under this test, should be applied to an existing claim unless that would alter after-the-fact legal standards that existed and were relied upon by the defendant at the time of the challenged conduct. See Bradley, 416 U.S. at 720.

To deprive plaintiffs of the Act's remedies and restored legal standards would give defendants an unwarranted windfall. Applying the Act retroactively to pending cases based on pre-Patterson conduct will actually

protect the interests that arose before 1989 and that are attached to cases still winding through the system. For such sets of cases, it is impossible to argue that retroactive application disturbs expectation interests or deprives parties of notice. "[T]here is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose." Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 720 (1960).

III. REFUSAL TO APPLY THE ACT RETROACTIVELY WOULD ARBITRARILY WORK A MANIFEST INJUSTICE UPON INNOCENT PARTIES

Denying retroactive application of the 1992 Act will arbitrarily create a class of persons (including Dr. Baker) with no recourse for the redress of civil rights violations.

Before this Court's decision in Patterson, all the Courts of Appeals had held that §1981 prohibited postformation conduct.[5] By passing the Civil Rights

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[5] See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 201-03 (1st Cir. 1987); Richards v. New York City Bd. of Educ., 668 F.Supp. 259, 267 (S.D.N.Y. 1987), aff'd mem., 842 F.2d 1288 (2d Cir. 1988); Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981); Patterson v. American Tobacco Co., 535 F.2d 257, 262 (4th Cir. 1976); Hernandez v. Hill Country Tel. Coop., Inc., 849 F.2d 139, 143-44 (5th Cir. 1988); Grubb v. W.A. Foote Memorial Hosp., 533 F.Supp. 671, 675-76 (E.D. Mich. 1981), aff'd, 759 F.2d 546 (6th Cir.), cert. denied, 479 U.S. 946 (1985); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986); Taylor v. Jones, 653 F.2d 1193, 1198-99 (8th Cir. 1981);

Act of 1991, Congress clearly reaffirmed that postformation discriminatory conduct was unlawful. See 42 U.S.C. §1981(c).

Thus, racially discriminatory conduct was actionable before the Patterson decision. The same conduct is actionable after the passage of the 1991 Act. Refusal to apply that Act retroactively will create a manifest injustice upon those persons whose cases were pending at the time of the Patterson decision. The creation of such an arbitrary class would be completely antithetical to the "policy of the Nation . . . [to move] constantly in the direction of eliminating racial

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Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984); Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985); Stallworth v. Shuler, 777 F.2d 1431, 1433 (11th Cir. 1985); Metrocare v. WMATA, 679 F.2d 922, 928 (D.C. Cir. 1982).

segregation in all sectors of society." Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring).

In sum, retroactive application of the Act does not implicate any of the concerns that make retroactivity potentially undesirable. The Act restored prior understandings of §1981, see Civil Rights Act of 1991, §3(4). Retroactive application of the Act will serve the legislative goal to eradicate discrimination from the American workplace.

This Court should grant a writ of certiorari, in order to address whether the Civil Rights Act of 1991 is to be applied retroactively.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit, and order full briefing and oral argument on the merits of this case.

Respectfully Submitted,

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TABLE OF CONTENTS

Opinion of the Eleventh Circuit. . . ii
(April 17, 1991)

Order of the District Court. iv
(November 30, 1990)

Eleventh Circuit's Denial
of Rehearing ix
(June 26, 1992)

District Court's Final Judgment. . . xii
(December 28, 1990)

**APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-5068

D. C. Docket No. 84-8188-Civ-NCR

JOE ALLEN BAKER, M.D.,

Plaintiff-Appellant,

versus

GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., FRANK B. HALL, INC.,

Defendants-Appellees.

Appeal from the United States District Court For the Southern District of Florida

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(April 17, 1992)

Before HATCHETT, Circuit Judge, JOHNSON and HENDERSON*, Senior Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1. "Costs taxed against plaintiff-appellant."

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Judgment Entered: April 17, 1992

For the Court: Miguel J. Cortez, Clerk

By: /s Karleen McNabb

Deputy Clerk

ISSUED AS MANDATE: **JUL 10 1992**

JOE ALLEN BAKER, M.D.,
Plaintiff,

v.

GULF WESTERN INDUSTRIES, INC., etc., et al.
Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.:88-8188-CIV-ROETTGER
ORDER

THIS CAUSE is before the Court on motion of Defendants for summary judgment of this cause. Upon consideration of the motion and the record in this cause, the court finds as follows.

Plaintiff JOE ALLEN BAKER was under contract with Defendant GULF WESTERN INDUSTRIES to provide medical services for Defendant's employees. Plaintiff alleges that Defendant GULF WESTERN INDUSTRIES paid lower rates for

the medical treatment of black seasonal harvest workers than other GULF WESTERN INDUSTRIES employees. Plaintiff contends when he refused to discriminate between employees, he was terminated. Plaintiff brings claims for violation of 42 USC § 1981, intention [sic] infliction of emotional distress and breach of contract.

In Patterson v. McLean Credit Union 109 S.Ct. 2363, 2373 (1989), the Supreme Court defined the scope of 42 USC § 1981 holding:

> Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of

> contracts . . . . the right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.

The allegations of Plaintiff's complaint do not relate to the making or enforcement of contracts but to conduct by the Defendant GULF WESTERN INDUSTRIES after the contract relation had been established. Therefore, there can be no claim based on 42 USC § 1981.

Also, Plaintiff JOE ALLEN BAKER has failed to sustain its Celotex burden with regard to his claims for intentional infliction of emotional distress. Plaintiff fails to allege

conduct so outrageous in character and so extreme in degree to go beyond all possible bounds of decency as required by Florida law. Mundy v. Southern Bell Telephone and Telegraph Company 676 F2d 503 (CA 11 Ga. 1982). Therefore, Plaintiff's intentional infliction of emotional distress claim cannot survive Defendant's motion for summary judgment.

In addition, Plaintiff has failed to bear his Celeotex burden with regard to the breach of contract claim. Defendant presents affidavits, including that of Plaintiff, which indicate that Plaintiff received final payment of all services under his contract and released any claim thereunder and that Plaintiff made undocumented loans to the claims supervisor which provided cause for termination.

Plaintiff JOE ALLEN BAKER simply

has not met its Celotex burden as to any of the claims. Plaintiff has failed to come forward with "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Therefore, it is

ORDERED AND ADJUDGED that motion of Defendants for summary judgment against Plaintiff JOE ALLEN BAKER is hereby GRANTED.

DONE AND ORDERED this 30 day of Nov, 1990.

/s

NORMAN C. ROETTGER, JR.

UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

_____

No. 91-5068

_____

[STAMPED AS "FILED, JUN 26 1992"]

JOE ALLEN BAKER, M.D.,

Plaintiff-Appellant,

versus

GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., FRANK B. HALL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

x

Before: HATCHETT, Circuit Judge, JOHNSON and HENDERSON*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s Joseph W. Hatchett

UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

JOE ALLEN BAKER, M.D.,

Plaintiff,

v.

GULF WESTERN INDUSTRIES, INC., etc., et al.

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.:88-8188-CIV-ROETTGER

FINAL JUDGMENT

THIS CAUSE before the Court on motion by Plaintiff to amend complaint. Plaintiff's motion comes six years after the suit was filed. Upon consideration of the motion and the record in this cause, it is

ORDERED AND ADJUDGED that the motion by Plaintiff to amend complaint is hereby DENIED.

FURTHER ORDERED AND ADJUDGED that the Court having granted Defendant's motion for summary judgment

under Rule 56 of the Federal Rules of Civil Procedure now enters judgment for Defendant and Plaintiff shall take nothing by his suit. Defendant to go hence without day.

DONE AND ORDERED this 28 day of Dec, 1990.

/s

NORMAN C. ROETTGER, JR.

UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record

92-552

No. [redacted]

Supreme Court, U.S.
FILED
DEC 21 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

vs.

GULF + WESTERN INDUSTRIES, INC., GULF + WESTERN FOOD PRODUCTS, CO., RISK MANAGEMENT SERVICES, INC. and FRANK B. HALL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GULF + WESTERN INDUSTRIES, INC. AND GULF + WESTERN FOOD PRODUCTS, CO.

ANTHONY E. PUCILLO
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QUESTIONS PRESENTED

I. Whether certiorari should be denied because Petitioner failed to adequately raise the claim that because Title VII relief is unavailable, *Patterson v. McLean Credit Union* should not bar this termination claim.

II. Whether certiorari should be denied because Petitioner failed to previously raise the issue of retroactive application of the Civil Rights Act of 1991.

III. Whether certiorari should be denied because Petitioner's claim that Title VII would not apply to this case and *Patterson* should not bar his claim is without merit.

IV. Whether certiorari should be denied because alternative grounds predominate and support affirmance.

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

Petitioners:

JOE ALLEN BAKER, M.D.

Respondents:

GULF + WESTERN INDUSTRIES, INC.,

GULF + WESTERN FOOD PRODUCTS CO.,

RISK MANAGEMENT SERVICES, INC.,

FRANK B. HALL, INC.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Statement of Facts and Perceived Misstatements of Fact by Petitioner	1
A. Statement of Facts	1
B. Perceived Misstatements of Fact	3
History of the Case	4
Reasons for Denying the Writ	6
I. Certiorari should be denied because Petitioner failed to adequately raise the claim that because Title VII relief is unavailable, *Patterson v. McClean Credit Union* should not bar this termination claim.	6
II. Certiorari should be denied because Petitioner failed to previously raise the issue of retroactive application of the Civil Rights Act of 1991.	9
III. Certiorari should be denied because Petitioner's claim that Title VII would not apply to this case and *Patterson* should not bar his claim is without merit.	10

Contents

Page

IV. Certiorari should be denied because alternative grounds predominate and support affirmance. ... 12

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Albert v. Caravano, 851 F.2d 561 (2d. Cir. 1988) 7

American Federal Savings & Loan Assoc. v. Novotny, 442 U.S. 366, 99 S. Ct. 2345 (1979) 8

Baker v. Gulf + Western Industries, Inc., 850 F.2d 1480 (11th Cir. 1986) 6

Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645 (1988) 9

Brown v. American Honda Motor Company Inc., 936 F.2d 946 (11th Cir. 1991) 13

Celotex v. Catrell, 477 U.S. 317 (1986) 5

DeMatteis v. Eastman Kodak, 511 F.2d 306 (2nd Cir. 1975), modified on other grounds, 520 F.2d 409 (2nd Cir. 1975) 7

Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986) 11

Contents

Page

Ellerby v. Illinois Circuit Court, 1988 U.S. Dist. Lexis 2092, 46 Fair Empl. Prac. Cas. (BNA) 524 (N.D. Ill. 1988) 11

Gersman v. Group Health Associates, Inc., 91-724, 112 S. Ct. 960, 1992 U.S. Lexis 655 (January 27, 1992) 9

Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983) 11

Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S. Ct. 2617 (1986) 4

Hamilton v. Komatsu-Dresses, Inc., 92-275, 113 S. Ct. 324, 1992 U.S. Lexis 6422 (October 13, 1992) 10

Hicks v. Brown Group, Inc., 91-1116, 112 S. Ct. 1255, 1992 U.S. Lexis 1380 (March 2, 1992) 9

Holland v. First Virginia Bank, Inc., 91-974, 112 S. Ct. 1152, 1992 U.S. Lexis 1266 (February 12, 1992) 9

Luddington v. Indiana Bell Telephone Co., 960 F.2d 225 (7th Cir. 1992) 9

Lutcher v. Musician's Union Local 47, 633 F.2d 1019 (9th Cir. 1980) 11

Marshmcbirney Inc. v. Montedoro-Whitney Corp., 882 F.2d 498 (D.C. Cir. 1989) 14

Contents

Page

McDonnell-Douglas v. Green, 411 U.S. 742, 93 S. Ct. 1817 (1973) 5, 14

NIX v. WLCY Radio/Raball Communications, 738 F.2d 1181 (11th Cir. 1984) 13

Pao v. Holy Redeemer Hospital, 547 F. Supp. 484 11

Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988) 11

Parr v. Woodmen of the World, 791 F.2d 888 (11th Cir. 1986) 7

Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989) .....i, 4, 5, 6, 7, 8, 9, 10, 12, 15

Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 11

Skinner v. Total Petroleum, 859 F.2d 1439 (10th Cir. 1988) 7

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) 5, 14

The Dartmouth Review v. Dartmouth College, 859 F.2d 13 (1st Cir. 1989) 7

Washington v. Yakima Indian Nation, 439 U.S. 463, 99 S. Ct. 740 (1979) 14

Contents

Page

Statutes Cited:

Civil Rights Act of 1991 ..... i, 6, 9

42 U.S.C. § 1981 ..... 4, 6, 7, 10, 14

42 U.S.C. § 1985 ..... 5, 6, 8

Rules Cited:

11th Circuit Local Rule 10(j)(2) 2, 12

Federal Rule of Appellate Procedure 28(j) 10

Federal Rule of Civil Procedure 58 3

STATEMENT OF FACTS AND PERCEIVED MISSTATEMENTS OF FACT BY PETITIONER

A. Statement of Facts

Respondent Gulf + Western Industries, Inc. (Gulf + Western) was a grower of sugarcane in South Florida. Respondent Risk Management ("Risk") was an adjuster ("claims administrator") and managed Gulf + Western's workers' compensation program required by state law. Petitioner Joe Allen Baker (who is 69 years old) is white and was a physician in rural Belle Glade, Florida who specialized in treating injured workers of Gulf + Western and other growers. He was called the "Medical Director" of Respondent Gulf + Western for some 15 years ending in 1980 (R6-253) and of other companies.

Gulf + Western and other companies annually employed a large number of imported West Indian harvest workers to cut cane under written contracts with the home governments (often Jamaica) through their agent, the British West Indies Central Labour Organisation ("BWICLO") (R7-243(I), R6-253 ¶ IV-D; R3-77 pp. 59-61). These workers arrived under a special U.S. Department of Labor program limiting the work they could do while in the United States.

For many years it was customary because of the high volume of claims in a short season to bill for treatment of BWICLO workers by a flat-fee per claim, originally arrived at by averaging the overall cost per claim, but later renegotiated every year or two (R6-231 p. 111; R12-294 p. 203; R7-241 ¶ 6; Petitioner's brief below, pp. 4-5). Petitioner claims that in later years the BWICLO rate worked out to be lower than the statutory maximum itemized or "unbundled" rates he was permitted to charge for domestic black and white workers (R12-294 p. 203, R3-77 pp. 55-6). He claims to suspect a racial motivation (Baker Affidavit p. 24). Petitioner testified (and conceded by not controverting the issue in

any Responsive Statement to Defendant's Statement of Material Facts not in dispute as required by Local Rule 10(j)(2) of the District Court) that he rendered the same high quality of care to the BWICLO workers that he did to all others including the bank president, unaffected by the rate schedule, that he was expected to do so and wouldn't do otherwise (R7-246 p. 4, R3-77 pp. 39, 53, 60-1, 63, 66-7; R6-234 p. 120; R7-246 p. 4).

Petitioner came under suspicion of conflict of interest, bill-padding or similar misconduct in early 1980 after examination of his charges by Risk, disclosure of an undocumented "loan" (without any repayment or note) to the adjuster approving his bills and because of his close friendship with an employee of Gulf + Western overseeing his charges, who was also Petitioner's attorney (R8-254 p. 9 and Exh. 10; R6-234 pp. 14, 32, 80-83, 88). It was disclosed some six years later by Petitioner in deposition that he had made a similar "loan" to that Gulf + Western employee in addition to being represented by him as his attorney not only in unrelated matters, but *in actual negotiations with Gulf + Western.*

Petitioner was terminated sometime prior to the fall harvest season in 1980 (R3-77 p. 88). He claims his termination was in retaliation for or as a result of his refusal to bill on a flat-rate basis and that the termination was "racially motivated."

Risk was fired, it fired the adjuster, the Gulf + Western employee lost control of the sugarcane operation worker's compensation program and a new Hispanic physician hired to treat all workers under a written contract providing uniform modified "flat-rate" fees for all workers, alien and domestic (R8-239 pp. 6-7 and Exh. A). This physician is the same one Petitioner testified that he would have selected as his successor (R12-294 p. 155).

Over a year after his termination, Petitioner received and deposited a check for all balances remaining in question with

release language in the accompanying letter as well as the check. Respondent Gulf + Western sold its sugarcane operations several years later, in 1984.

B. Perceived Misstatements of Fact

Petitioner consistently recites disputed issues as factual, perhaps carrying forward a pattern tolerated in direct appeal from summary judgment because of assumptions favorable to the nonmoving party where record proof is conflicting. Petitioner relies heavily upon claims made and conclusions supported only by his own affidavit (which was protested below as not in compliance with Rule 58 and as containing hearsay, inadmissible conclusions and unsupported opinions and not affirmatively demonstrating admissibility). Disputed allegations include Petitioner's "belief" that there was any discriminatory intent; that rates paid him were lower; that Petitioner never complained about flat-fee arrangements; that refusal to bill on a "flat-fee" arrangement was the cause of his rates being higher than those of other doctors (there is no indication that any others *were* billing on a flat-fee basis); that BWICLO workers were usually more seriously injured than other workers (the same "flat-fee" was paid for minor abrasions and debris in eyes or ears as well as for cuts); that Gulf + Western ever agreed to his unilateral rate changes; that Petitioner refused to enter into a new contract and that his firing was related to any flat-rate agreement as opposed to suspected overbillings, kickbacks or conflicts of interest, excessive fees and simple economic competition. Since it is the province of the courts below to determine the existence of disputed material issues rather than the traditional role of this Court on certiorari, Petitioner's practice of stating his own claims as factual is inappropriate.

HISTORY OF THE CASE

In April, 1984, (nearly four years after the disputed events) Petitioner sued for compensatory and punitive damages under 42 U.S.C. § 1981 claiming that his termination as "Medical Director" directly resulted from his alleged refusal to charge lower rates for alien workers than for domestic workers. He claimed his contract had been orally renewed for the 1980-81 crop year and then wrongfully terminated. He also made similar § 1981 claims for previous crop years, and asserted pendent state claims on the same facts for "intentional infliction of emotional distress" and for breach of contract (R1-1; R1-9). Two years later the trial court dismissed the action as untimely, applying a two-year limitation period. The Court of Appeals for the Eleventh Circuit, applying this Court's intervening decision in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1986) reversed, applying the 4-year Florida tort limitations period. Dismissal of the pre-1979 claims was affirmed. After remand the case proceeded through all pretrial phases including pretrial conferences, stipulation and order after extremely voluminous document production and over 40 depositions in various states.

This Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989) in June, 1989 following extended press coverage and speculation regarding the viability of private civil actions under § 1981. In April 1990, Respondents moved for summary judgment relying alternatively on *Patterson*, and on Petitioner's total failure to present a *prima facia* claim and to refute Respondent Gulf + Western's legitimate nondiscriminatory articulated reasons for his termination (suspicion of overbilling, conflict of interest, appearance of bribery and noncompetitive rates resulting in termination not only of Petitioner, but of Risk and its adjuster and complete restructuring of the safety (workers' compensation) department.

Pretrial proceedings were concluded and pretrial stipulations filed acknowledging the application of *Patterson* to be an issue for determination by the court (R7-253). On September 25, 1990, six months after pretrial and 10 years after the disputed events at summary judgment hearing, Petitioner for the first time presented proposed amendments. His amended complaint alleged, contrary to his repeated emphatic testimony that the contract originally claimed to have been renewed and then terminated was instead never renewed at all. Petitioner also attempted to add for the first time a claim under 42 U.S.C. § 1985 on identical facts claiming a private conspiracy.

The trial court granted summary judgment (R13-327 p. 330), denied Petitioner's belated post-pretrial amendments as untimely and entered final judgment for respondents. The trial court concluded that under *Patterson,* Petitioner's termination claim was meritless and that state law grounds, including release and good cause for termination, supported disposition of the remaining claims. The court noted that Petitioner had "simply not met its *Celotex* burden as to any of the claims." [referring to *Celotex v. Catrett,* 477 U.S. 317 (1986)].

Petitioner appealed, asserting as error the claim that *Patterson* does not apply to a refusal to renew a contract, as well as the denial of his proposed amendment and the dismissal of the contract claim. Petitioner *did not* appeal dismissal of its "intentional infliction of emotional distress" claim on state law grounds.

On appeal, Respondents argued alternatively that nonrenewal of Petitioner's longstanding relationship was "postcontractual" under *Patterson* and that Petitioner had failed to demonstrate a *prima facie* claim or to refute Respondents' legitimate, nondiscriminatory basis for Petitioner's firing [*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981); *McDonnell-Douglas v. Green,* 411 U.S. 742, 93 S. Ct. 1817

(1973)]. Respondents argued that the trial court's discretionary denial of Petitioner's belated post-pretrial amendment was proper due to Petitioner's 10-year delay and also due to the futility of amendment since under *Patterson*, nonrenewal is as much a postcontractual event as discharge. Finally, Respondents argued the futility of amendment to add a § 1985 claim since the same was no more supported by the record than was the § 1981 claim and was further unavailable to Petitioner since a remedy had been available under Title VII.

The Civil Rights Act of 1991 was enacted in November, 1991. Thereafter Respondents filed their answer briefs and Petitioner its reply brief. Oral argument was held on April 1, 1992 with *per curiam* affirmance on April 17, 1992. Petitioner's Motion for Rehearing and for Rehearing *en banc* was filed on May 6, 1992 and denied June 26, 1992.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO ADEQUATELY RAISE THE CLAIM THAT BECAUSE TITLE VII RELIEF IS UNAVAILABLE, *PATTERSON V. MCLEAN CREDIT UNION* SHOULD NOT BAR THIS TERMINATION CLAIM.

Petitioner's position as company doctor was probably an independent contractor relationship, rather than a common-law "employee" status as observed by the Eleventh Circuit. *Baker v. Gulf + Western Industries, Inc.*, 850 F.2d 1480 (11th Cir. 1986). Petitioner is white. He does not claim discrimination against himself based on his race, nor does he attempt to redress injury to others. His demand for millions in windfall punitive damages for himself is predicated upon the apparent claim that termination of

his status as "medical director" was in retaliation for his claimed refusal to charge different rates for treating alien harvest workers than for treating domestic black and white employees. He claims racial motivation although he rendered identical treatment and the rate structure was without impact. (The flaws in that logic are addressed elsewhere in this brief.)

Petitioner has never articulated any authority for his supposed § 1981 claim, leaping directly from the assertion of Respondents' claimed racial animosity toward others to the conclusion that his firing was in violation of § 1981. Respondents and the courts below have assumed (in the absence of any authority articulated by Petitioner) that Petitioner relies upon cases following *DeMatteis v. Eastman Kodak*, 511 F.2d 306 (2nd Cir 1975), *modified on other grounds*, 520 F.2d 409 (2nd Cir. 1975) (where, for example, an employee was fired for selling his home to a black family). His claim already rests upon an extension of § 1981 beyond any scope directly sanctioned by this Court although retaliation cases under § 1981 have been upheld by various Circuits [*see, e.g., Parr v. Woodmen of the World*, 791 F.2d 888 (11th Cir. 1986); *Skinner v. Total Petroleum*, 859 F.2d 1439 (10th Cir. 1988); *The Dartmouth Review v. Dartmouth College*, 859 F.2d 13 (1st Cir. 1989); *Albert v. Caravano*, 851 F.2d 561 (2nd Cir. 1988)].

Respondents have consistently asserted that Petitioner's attempts to clothe himself in *DeMatteis* fall short, and even the viability of *DeMatteis* is subject to question after *Patterson* (there the firing would be postcontractual). Petitioner now asserts that *Patterson* only applies to common-law employment claims and cannot bar his claim because as an independent contractor he had no Title VII remedy. He appears to be wrong, as argued elsewhere. The focus of *this* argument is that Petitioner has never before adequately presented this position.

A review of Petitioner's briefs on appeal discloses two

references to Title VII, neither of which is sufficient to support an argument that the issue was adequately presented to the Circuit Court.

Arguing that the nonrenewal of Petitioner's contract was not termination but a "refusal to contract" or a refusal to offer nondiscriminatory terms under *Patterson,* Petitioner states, "it should also be noted that neither of these theories would fall within the scope of Title VII" (at p.17 of Petitioner's main brief).

In Respondents' answer brief Gulf + Western argued that Petitioner's attempted § 1985 claim was not only untimely but futile, since § 1985 creates no new rights and in addition cannot be asserted where a Title VII remedy is available [*American Federal Savings & Loan Association v. Novotny,* 442 U.S. 366, 99 S. Ct. 2345 (1979)]. In reply, Petitioner argued (at p. 8 n. 3) that "Gulf + Western claims the Plaintiff might be considered an employee for Title VII purposes, but cites only cases where physicians' hospital privileges were at issue. Dr. Baker was not an employee of Gulf + Western under any analysis and, therefore, could have no Title VII claim against the Defendants."

Before even asserting a refusal to contract, Petitioner had to establish an abuse of discretion in the trial court's refusal, 10 years after the fact, 6 months after pretrial and 1 1/2 years after *Patterson* to permit his amendment to add a claim of nonrenewal to its claim of termination. It is much different, in one sentence, to assert unavailability of Title VII relief as a circumstance for consideration in that context or in the addition of a § 1985 claim than to devote nine (9) pages as it does here to arguing that *Patterson* applies only to common-law employment claims.

Petitioner's briefs below totalled fifty pages. Petitioner can hardly be said, in two sentences equally referable to equitable circumstances supporting amendment and to its § 1985 claim, to

have properly framed the argument that *Patterson* by its terms applies only to common-law employment relationships to which it devotes nine pages here.

This Court has in the past applied a stringent standard in determining whether issues were adequately framed and presented on appeal below. In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988) the court rejected similarly vague and "oblique" references as inadequate. "Perfunctory" and "skeletal" arguments have been held not to preserve an issue for review by lower courts *Luddington v. Indiana Bell Telephone Co.*, 960 F.2d 225 (7th Cir. 1992). Either the issue is a passing one meriting only two "oblique" and vague references or it is an urgent matter of great public importance so as to support certiorari in which event the Circuit Court should have been given a clear opportunity to address it.

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO PREVIOUSLY RAISE THE ISSUE OF RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991.

This Court has previously refused to review the merits of several cases wherein plaintiffs failed to present to the court below their arguments for retroactive application of the Civil Rights Act of 1991 [*Hicks v. Brown Group, Inc.*, 91-1116, 112 S. Ct. 1255, 1992 U.S. Lexis 1380 (March 2, 1992); *Holland v. First Virginia Bank, Inc.*, 91-974, 112 S. Ct. 1152, 1992 U.S. Lexis 1266 (February 12, 1992); *Gersman v. Group Health Associates, Inc.*, 91-724, 112 S. Ct. 960, 1992 U.S. Lexis 655 (January 27, 1992)]. In each of those cases, appeal below was concluded and petition to this Court apparently filed before enactment of the 1991 Act which has been reported as November 7, 1991 with an effective date of

November 21, 1991. Each was remanded for consideration of the issue.

The Court has refused without remand to review a previous case wherein, although the appeal below was concluded after enactment of the 1991 Act, its asserted retroactivity was not raised below *Hamilton v. Komatsu-Dresser, Inc.*, 92-275, 113 S.Ct. 324, 1992 U.S. Lexis 6422 (October 13, 1992). There the case was argued below a month after enactment and the appeal decided 5 months later in May, 1992 with no attempt to raise the issue in the interim period nor by rehearing motion.

Here the case remained before the Circuit Court for 7 1/2 months after enactment and Petitioner remained silent on the issue in its reply brief, at oral argument, in its rehearing motion and never sought supplementation under Federal Rule of Appellate Procedure 28(j), despite spectacular coverage in the national and professional media.

III.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S CLAIM THAT TITLE VII WOULD NOT APPLY TO THIS CASE AND *PATTERSON* SHOULD NOT BAR HIS CLAIM IS WITHOUT MERIT.

Petitioner now argues that *Patterson* applies only where Title VII remedies are available to a plaintiff. Despite this Court's carefully articulated opinions setting forth the logical and semantic foundations of its decision, Petitioner attempts by directing his attention to a few selected sentences to transform *Patterson* into a mere policy decision by this Court to direct aggrieved plaintiffs toward Title VII remedies by depriving them of relief under § 1981. Without yielding further to the temptation to brief the merits here, it is sufficient to say that Petitioner cites not a single

decision, appellate or otherwise, in support of its interpretation. If the issue is of great importance it will in short order be asserted in a case which truly presents it and in which the court below has passed upon it.

Further demonstrating the inappropriateness of this case as a vehicle for determining matters of great public importance (if indeed this is such an issue) Title VII relief probably was available to Plaintiff had it been sought. Contrary to Petitioner 's assertion, a common-law employment relationship is not always required for Title VII relief. In fact, physicians have been singled out for relief despite independent contractor status. In *Pardazi v. Cullman Medical Center,* 838 F.2d 1155 (11th Cir. 1988) Title VII relief was predicated on denial of staff privileges interfering with a contract of employment by others. (*Id.* at 1156; *see also, Lutcher v. Musician's Union Local 47,* 633 F.2d 1019 (9th Cir. 1980); *Gomez v. Alexian Bros. Hospital of San Jose,* 698 F.2d 1019 (9th Cir. 1983). Even the interference with a physician's contract with his or her own patients has been held sufficient to support such relief, *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411 (7th Cir. 1986); *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 at 1342; *Pao v. Holy Redeemer Hospital,* 547 F. Supp. 484, 494-5. Analogously, a part-time public defender was afforded Title VII relief in *Ellerby v. Illinois Circuit Court,* 1988 U.S. Dist. Lexis 2092, 46 Fair Empl. Prac. Cas. (BNA) 524 (N.D.Ill. 1988) wherein the court observed:

> the ultimate question posed . . . is not whether the Plaintiff is an employee or independent contractor; rather, the query is whether the Plaintiff may bring an action under Title VII.

Petitioner misses the point in attempting to distinguish these cases as involving "staff privileges." The point is that a racially-motivated interference by a third party with whom the Petitioner

has only an independent contractor relationship (here the Respondent, there the hospitals) interferes with the employment relationship between patient and physician. If Petitioner's claim here had merit at all it would be because Respondent's termination of Petitioner would have interfered with just such relationships.

This Title VII issue is itself a difficult and significant issue, and however decided would not afford Petitioner relief under Title VII which he waived eleven years ago. Its determination would, however be a prerequisite to the re-examination or modification of *Patterson* which Petitioner demands by asserting the unavailability of Title VII relief.

Petitioner is incorrect in attempting to distinguish *Patterson*. Moreover, this issue serves to demonstrate the inappropriateness of this case as a vehicle for any re-examination of *Patterson*.

IV.

CERTIORARI SHOULD BE DENIED BECAUSE ALTERNATIVE GROUNDS PREDOMINATE AND SUPPORT AFFIRMANCE.

Petitioner testified repeatedly that despite any fee arrangement he gave all workers the same high quality care. He would not have done otherwise and wasn't expected to. He also conceded this fact under local Rule 10(j)(2) when he elected not to file a responsive Statement of Facts in issue. Therefore, the racial motivation Petitioner might purport to impute from the presumed logical extension of his argument – that a differing fee arrangement would result in poorer medical care – is refuted both as to reality and as to the parties' expectations by his own testimony. It neither occurred nor was it expected to.

Petitioner in fact professes no knowledge of why he was

terminated but allows as possibilities personal vendetta and economic and other factors (R12-294, pp. 141, 143, 145-6, 156-7; R12-294 pp. 158, 205). All are permissible, if not laudable nondiscriminatory reasons. *Brown v. American Honda Motor Company Inc.*, 936 F.2d 946 (11th Cir. 1991); *NIX v. WLCY Radio/ Raball Communications,* 738 F.2d 1181, 1187 (11th Cir. 1984).

He concedes that, when the flat-rate agreement was in effect the rate determination was not based on race nor even alienage, but on whether an employee was a BWICLO seasonal contract employee or not. For example, a Jamaican he treated under contract would generate one fee, but the same Jamaican if not under contract would be billed as if a domestic black or white worker (R3-77 pp. 60-63, 108). He had no intention of discriminating against offshore workers, nor at the time did he believe the growers did (R12-294 p. 202).

When Petitioner claims to have been terminated for refusing to return to a flat-fee arrangement, Petitioner admits that there was neither a discussion of *what* that rate would be nor to whom it would apply – high or low, uniform or differential rates (R3-77 pp. 81-2; R12-294 p. 203). His successor's contract clearly provided identical rates for all workers (R8-239 pp. 6-7 and Exhibit A). The Petitioner would not have accepted the job for the rates the successor agreed to (R10-286 pp. 17-19) and the successor is the man Petitioner would probably have selected himself (R12-294 p. 155).

Petitioner was under suspicion of overbilling and conflict of interest (R8-254 p. 9 and Exh. 10; R8-240 p. 5; R8-239 pp. 4 -8), he had made undocumented, unrepaid loans of $4,000 and $4,500 to both the outside adjuster and the Gulf + Western employee overseeing his work and charges (R6-234 pp. 79-81, R10-286 p. 67; R10-286 p. 67, R3-77 pp. 100-103). The Gulf + Western employee actually overseeing Petitioner's fees represented

Petitioner as his attorney in negotiations with his employer (R6-234 pp. 14, 32, 80-83, 88).

Not only was Petitioner terminated, but the adjusting company (Corespondent Risk Management), and its adjuster were fired and the Gulf + Western employee lost responsibility for the entire program [R8-254 p. 10 and Exh. 12; R7-240 ¶ 4(a); R7-239 ¶ 5; R7-239 ¶ 5; R7-240 ¶ 4(b)].

In short, there was no classification by race and (to the extent pertinent under § 1981) no disparate impact. There is no direct evidence of racially-motivated intent nor can any be inferred. Petitioner's termination is supported by economic competition, and by grounds found as a matter of law by the trial court, and affirmed on appeal, to have constituted good cause for termination. The successor chosen and the terms of his contract dispel any implication of racial motivation.

Petitioner failed to present any analysis of his claim under *Burdine* and *McDonnell-Douglas, supra,* and never even responded to Respondent's analysis. Petitioner failed by any direct evidence or otherwise to refute Respondent's legitimate, nondiscriminatory cause. Petitioner simply leaps from a claim of differential billing rates to a conclusion of intentional racial discrimination.

Respondent preserved all of these issues on appeal, asserting its right to: ". . . defend its judgment below on any ground properly raised below whether that ground was relied upon, rejected or even considered . . ." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 476, 99 S.Ct. 740, 749 n. 20 (1979); *Marshmcbirney Inc. v. Montedoro-Whitney Corp.,* 882 F.2d 498 (D.C. Cir. 1989). This respondent devoted approximately 1/2 of its briefs below to these issues and the bulk of its argument in the trial court.

Judging by the seventeen-day period between argument and *per curiam* affirmance, the Circuit Court had little difficulty affirming the summary judgment on this record. If the reasoning of a court can ever be deduced from a panel's questions (and perhaps it cannot) the primary issues of inquiry were (a) why Petitioner felt it had raised any *prima facie* claim and (b) why it felt entitled to argue unpleaded pre-contractual discrimination without first overcoming the "abuse of discretion" standard of review and thereby being permitted its belated reversal of position in its alternative claim.

Petitioner asserts that this cause presents for determination two issues of great public importance, but neither has been previously presented. Moreover, in both courts below Petitioner has failed to persuade eminent jurists that even a material issue or a *prima facie* case were presented. The *per curiam* affirmance below is equally consistent with the application of *Patterson* of which Petitioner now complains and with a finding that Petitioner has utterly failed under any analysis, pre- or post *Patterson* to present the essential elements of a claim.

Respondents have been required to explore the entire record and a multitude of issues for nearly nine years and in two courts. Neither Respondents nor this Court should be burdened with a third exploration.

CONCLUSION

For the reasons set forth above it is respectfully concluded that certiorari should be denied.

Respectfully submitted,

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CASE NO.: ~~91-7472~~

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

vs.

GULF & WESTERN INDUSTRIES, INC.,
GULF & WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

RESPONDENTS', RISK MANAGEMENT SERVICES, INC. AND FRANK B. HALL, INC.'S, BRIEF IN OPPOSITION TO PETITIONER, JOE ALLEN BAKER'S, PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUE THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.

II. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.

III. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE TO HIM UNDER TITLE VII IS WITHOUT MERIT.

IV. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFFIRMED ON SEVERAL OTHER DISPOSITIVE GROUNDS.

PARTIES TO THIS CAUSE

JOE ALLEN BAKER

GULF & WESTERN INDUSTRIES, INC.

GULF & WESTERN FOOD PRODUCTS CO.

RISK MANAGEMENT SERVICES, INC.

FRANK B. HALL, INC.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to This Cause	ii
Table of Authorities	v
Statutes and Rules at Issue	vii
Statement of the Facts	1
History of the Case	12
Summary of Argument	21
Argument:	
I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUE THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.	25
II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.	30

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE TO HIM UNDER TITLE VII IS WITHOUT MERIT. 34

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFIRMED ON OTHER DISPOSITIVE GROUNDS. 36

Conclusion 43

TABLE OF AUTHORITIES

	Page
Adickes v. S. H. Kress & Company 90 S.Ct. 1598, 1602 n.2 (1970)	23
Clark v. Huntsville, 717 F.2d 525 (11th Cir. 1983)	33
Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986)	28
Duignan v. United States, 47 S.Ct. 566, 568 (1927)	23
EEOC v. Federal Labor Relations Authority, 106 S.Ct. 1678, 1681 (1986)	23
FTC v. Groiler, Inc., 103 S.Ct. 2209, 2212 n.6 (1983)	23
General Building Contractor's Association v. Pennsylvania, 102 S.Ct. 3141 (1982)	32
Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1982)	28
Lawn v. United States, 78 S.Ct. 311, 324 n.16 (1958)	23
Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985)	33
Mousari v. Beebe Hospital of Sussex County, Inc., 674 F.Supp. 145 (D. Dela. 1987)	28

Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988) 28

Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1980) 15-17, 20,21, 25-27, 28,30

Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1312 (7th Cir. 1985) 33

Rogers v. Lodge, 102 S.Ct. 3272, 3281 (1982) 23

Texas & P.Ry. Co. v. Southern Pac. Ry. Co., 11 S.Ct. 10, 12 (1890) 29

United States v. New York Telephone Co., 98 S.Ct. 364, 369 n.8 (1977) 32

Whitley v. Albers, 106 S.Ct. 1078, 1087 (1986) 32

STATUTES AND RULES AT ISSUE

This case implicates, in addition to 42 U.S.C. § 1981, set forth in Petitioner's Brief, Rule 10(J)(2) of the Local Rules for the United States District Court for the Southern District of Florida, which provides:

> 10(J)(2) Motions for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, stamped addressed envelopes for notice, and a concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. **The papers opposing a motion for summary judgment shall include** a memorandum of law, necessary affidavits, and **a concise statement of the material facts as to which it contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.**

STATEMENT OF FACTS

Plaintiff, JOE ALLEN BAKER, is a white male physician who practiced medicine at least until 1980 in Belle Glade, Florida. (R7-246). Plaintiff was often referred to as the "Medical Director" of Defendant, GULF & WESTERN, INC's, Okeelanta Sugar Operation from the 1960's until his termination in 1980. (R6-253).

GULF & WESTERN was self-insured for its worker's compensation program. As such, a claims administrator was required by law. (R6-253, para. IV C). In 1978, RISK MANAGEMENT SERVICES, INC., (RISK) entered into a written contract with GULF & WESTERN, whereby it agreed, for monetary consideration, to provide claims administration for GULF & WESTERN's worker's compensation claims for its sugar cane operations. This contract was renewed in De-

cember, 1979. (R8-254, para. 1).[1] This contract did not require RISK to engage or retain any particular physician to provide medical service to GULF & WESTERN's injured workers. (R8-254, para. 2).

RISK, as per its contract with GULF & WESTERN, provided claims administration. (R8-254, para. 3). It would receive claims, determine their compensability, file appropriate forms with the State of Florida's Department of Labor and Employment Security, and make payments of medical bills and employee compensation where appropriate and required. (R8-254, para. 3). RISK was only paid for the service it provided; any payment of medical bills, compensation, or other associated expenses

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[1] The Statement of Material Facts filed by Defendants, RISK and HALL (R8-254) in support of their Motion for Summary Judgment was uncontroverted by Plaintiff, as required by Rule 10(J)(2) of the Local Rules for the Southern District of Florida; as such, these facts are deemed admitted.

were paid from the account of or funded by GULF & WESTERN. (R8-254, Para. 3).

For many years thousands of foreign seasonal workers have been employed in the sugar cane industry and by GULF & WESTERN. These workers came to the United States under negotiated agreements with the British West Indies Central Labor Organization under limited H-2 temporary Visas (R3-77, pp. 59-61), and could only work cutting cane or as cooks for the cane cutters (R6-230, pp. 8, 11, 39). It is these workers whom Plaintiff refers to in his Amended Complaint as "BWI's." Most of these BWI's were from Jamaica or Barbados. (R77, p. 59).

Approximately half of Plaintiff's volume of medical practice consisted of treating the injured seasonal cane cutters for GULF & WESTERN. (R3-77, p. 71). In fact, he would see as many as two thousand cane cutters per year. (R3-77, p. 71).

There was for many years a billing agreement between several of the sugar mills and various doctors that, as to the seasonal cane cutters who came to the United States by the thousands in the winter, they would have a simplified billing procedure where there was a flat fee billed per patient, per incident. (R6-231, p. 22). This "flat fee" applied only to these contract workers -- not to the year-round employees or otherwise. (R3-77, p. 56).

From 1965 to 1979 Plaintiff had such an agreement with GULF & WESTERN. Plaintiff utilized a "contract medical rate" for his treatment of "BWI" workers, whereby he was paid a flat fee per patient, per incident, rather than itemizing and separately billing each service. (R7-253; R3-77, pp. 47, 48, 51-53, 57). The "flat fee" billing simplified the billing pro

cess. (R6-231, p. 11; R.12-294, p. 203; R.7-241, para. 6).

Plaintiff has conceded that there was no classification of the subject class of workers based upon race or alienage. (R7-246 para. IV(D)(6), R3-77, pp. 60-63, 108-109). If an injured worker was a BWI contract worker, the "flat fee" was paid to Plaintiff. (R3-77 pp. 60-63, 108-109). If the identical black, alien worker were not a BWI imported contract worker, Plaintiff would be paid the non-contract rate, just as for a domestic black or white employee. (R3-77 pp. 60-63, 108-109).

Plaintiff has testified that GULF & WESTERN expected him to give, and he did give, the same good quality of medical care to all GULF & WESTERN employees. (R7-246, para. 4). Plaintiff emphatically testified that, although he was for many years paid at a different rate for treating the BWI contract workers, they always

received the same excellent medical care given all other GULF & WESTERN employees. (R7-246, para. 4). Plaintiff stated that he did not, and would not, render bad or substandard medical care regardless of the fee arrangement. (R3-77, pp. 39, 53, 60-61, 63, 66-67; R.6-234, p. 120; R.7-246, para. 4). Plaintiff's nurse, Ann Cumpton (R6-232, pp. 44, 67), an employee-physician, Dr. Luis Hernandez (R6-235, p. 21), and RISK's claims adjuster, Palmer Pierce (R6-231, pp. 86-87) echoed Plaintiff's testimony in this regard.

On January 1, 1979, Plaintiff changed his method of billing with respect to his treatment of the BWI contract workers. Instead of billing on the basis of the flat fee arrangement, he started billing on a different basis, according to a schedule promulgated under the State of Florida Worker's Compensation Laws, which is a schedule of <u>maximum</u> fees that can be

charged by physicians and other medical personnel. (R7-253 para. IV E; R3-77 pp. 48, 68). Bills submitted in this fashion were approved by RISK's adjusters and paid from the accounts of or funded by GULF. (R8-254, para. 4).

In late 1979 or early 1980, senior management of GULF & WESTERN commenced a review of its sugar cane operations conducted by its food products division, including the worker's compensation program. (R8-254, para. 5). It obtained an audit by Aetnatech Services which was critical of the efficiency of RISK's operations. (R8-254, para. 5). The pertinent comments were sent to RISK for response; however, the response received from RISK was not viewed as productive by GULF & WESTERN's casualty insurance manager, A. G. Turner. (R8-254, para. 6).

Concurrently, Laura Wishart Connaster, of RISK, had observed a pattern of

inflated prescription charges on Plaintiff's bills that were being sent to RISK for review. (R8-254 para. 7). As a result, she and Palmer Pierce, the former claims adjuster of the GULF & WESTERN account, met with Plaintiff on or about April 3, 1980, to discuss these discrepancies and attempt to effect a resolution and settlement. (R8-254, para. 7; R6-231 pp. 34-39).

Because the issue was not resolved, RISK began withholding payment of the portions of bills which they concluded were overcharges. (R8-254, para. 8; R3-77 pp. 105-106; R10-286 p. 91). Plaintiff complained to GULF & WESTERN employee, Tony Alvarez, with whom he had a longstanding relationship. (R8-254, para. 8). As a result, a second meeting was held in Plaintiff's office on May 22, 1980. (R8-254, para. 9). In attendance were the Plaintiff, Palmer Pierce and the comptrol-

ler of GULF & WESTERN's local food products division, Arturo De la O. (R8-254, para. 9). At that meeting, it was disclosed that Plaintiff had advanced RISK's Palmer Pierce four thousand ($4,000.00) dollars in cash. (R8-254, para. 9). No promissory note was executed and the loan was never repaid. (R10-286 p. 67; $3-77 pp. 100-103). The events of the meeting were disclosed tc senior management of GULF & WESTERN in New York. (R8-254, para. 9).

Plaintiff testified that during July or August of 1980, he met with the Safety Vice President of GULF & WESTERN (Richard Sanchez) to determine whether he would continue as Medical Director. Plaintiff testified that although he no longer agreed to use the previous "flat fee," his contract with GULF & WESTERN was verbally renewed for the 1980-1981 harvest season. (R3-77, p. 81; R12-294, p. 141).

Thereafter, as a result of the audit, the disclosure of Plaintiff's loan to RISK's Palmer Pierce, and an overall concern for the effectiveness of the program administration, the decision was made by GULF & WESTERN in New York to terminate the services of RISK and replace them with National Employers. (R8-254, para. 10).

Concurrently, but as an independent act, GULF & WESTERN decided to obtain the services of a new "company doctor" by entering into a written contract with Dr. Raul Ramos, effective August 1, 1980. (R8-254, para. 11). RISK played absolutely no part in the decision not to utilize Plaintiff's services any longer. (R8-254, para. 12). RISK was terminated for the reasons set forth above, and had no input into the selection of Dr. Ramos. (R8-254, para. 12).

RISK was a separate, wholly-owned subsidiary of Frank B. Hall & Co., Inc. There is no entity known as FRANK B. HALL, INC. (R8-254, para. 13). There is no evidence of any direct involvement in any way of the personnel of HALL in the operation of RISK. (R8-254, para. 13).

HISTORY OF THE CASE

Plaintiff filed his Complaint on April 4, 1984. (R1-1). An Amended Complaint was filed on September 12, 1984, which asserted the following four counts: Count I asserted a claim under 42 U.S.C. § 1981 for Plaintiff's contract termination; Count II asserted a claim under 42 U.S.C. § 1981 for underpayment for years prior to 1979; Counts III and IV asserted pendent claims for intentional infliction of emotional distress and breach of an oral contract arising from Plaintiff's termination in 1980.

Defendants filed Motions to Dismiss the § 1981 claims of Counts I and II based on the expiration of the applicable statute of limitations for § 1981 claims. On October 11, 1986, the District Court granted the Motions to Dismiss based on the limitations defense. (R2-71). Plaintiff appealed. The Eleventh Circuit Court

of Appeals affirmed as to Count II, but reversed as to Count I, applying a four-year statute of limitations instead of the two-year limitation applied by the trial court.

On remand, Defendants answered (R4-128, 136), and discovery proceeded, which consisted of voluminous document production (R4-139, 140, 145, 148-155, 157-188, 164, 195, 198), and over forty depositions taken locally and around the country. (R4-142-143, R5-201, 208).

On April 4, 1990, Defendant, GULF & WESTERN, filed its Motion for Summary Judgment (R7-237) and Memorandum of Law in support thereof. (R7-242). On April 16, 1990, Defendants, RISK and HALL, filed their Motions for Summary Judgment (R7-256), and Memorandum in support thereof. (R7-257).

Local Rule 10(J)(2) of the United States District Court for the Southern District of Florida requires that all Defendants serving Motions for Summary Judgment also serve a statement of material facts as to which it is contended no genuine issue exists for trial. (See page vi. for Rule 10(J)(2), supra.) All Defendants served their Statements of Material Facts, along with their Motions for Summary Judgment in accordance with Rule 10(J)(2).

Rule 10(J)(2) further provides that all material facts set forth in the statement required to be served by the parties moving for summary judgment will be deemed admitted unless controverted by the opposing party in a statement of material facts as to which it contends that there does exist a genuine issue to be tried. Plaintiff did not file a statement of material facts, and did not controvert those Statements filed by the Defendants. Nor has he

ever sought to do so thereafter. As such, both Statements of Facts filed by the Defendants are deemed admitted.

A Pretrial Conference was held before the Court on April 19, 1990. Plaintiff then filed his Responses to Defendants' Motions for Summary Judgment. (R8-268, R9-269, 270).

In July, 1990, Plaintiff moved to expedite trial. (R12-298, 300). A Status Conference was held before the Court on August 31, 1990 and a hearing was scheduled for September 25, 1990 on Defendants' Motions for Summary Judgment.

On September 21, 1990, Plaintiff moved to amend his Complaint to alter certain factual allegations which he maintained as the basis for his § 1981 cause of action throughout the six and one-half years of discovery and court proceedings.[2]

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[2] Plaintiff's Motion for Leave to Amend his Complaint was not even received by Defendants' counsel until the morning

(R13-319-320). Specifically, Plaintiff sought to claim that GULF & WESTERN refused to renew his contract in 1980. The attempt to amend at the eleventh hour was a belated attempt by Plaintiff to try to avoid the effect of Patterson v. McLean Credit Union, which held that there is no cause of action under § 1981 for post-contractual conduct. Plaintiff also sought to amend to assert a new cause of action under 42 U.S.C. § 1985, claiming that Defendants conspired during 1980 to discriminate in violation of this statute.

Defendants' Motions for Summary Judgment were argued on September 25, 1990, and granted by Order of November 30, 1990. (R13-327). The Court found that the allegations of Plaintiff's Complaint were re-

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of September 25, 1990 at the hearing on Defendants' Motion for Summary Judgment.

lated to post-contractual activity[3] (a retaliatory termination) and barred by the case of Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1980). Summary judgment was also entered in favor of Defendants on the pendent claims. On December 28, 1991, the District Court entered judgment in favor of Defendants, and also denied

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[3] Plaintiff states in his Petition for Writ of Certiorari that the District Court incorrectly found that the allegations of Plaintiff's Complaint do not relate to the making and enforcement of contract, but to conduct by GULF & WESTERN after the contract relation had been established. (Page 10, Footnote 2). However, a brief look at the allegations in the Complaint show that it is Plaintiff who is mistaken. The Complaint states,

1. That prior to the summer of 1980, Plaintiff contracted with GULF & WESTERN to be the company medical director.

2. That during the summer of 1980, GULF & WESTERN demanded that Plaintiff reduce his charges for care rendered to the alien, Negro employees, and

3. That as a direct and proximate result of Plaintiff's refusal, his contract was terminated.

Plaintiff's Motion to Amend his Complaint. (R13-329).

Plaintiff thereafter filed an Appeal with the United States Court of Appeals for the Eleventh Circuit. Plaintiff's Brief, filed August 20, 1991, argued that the District Court had erred in granting summary judgment for Defendants on the Plaintiff's § 1981 civil rights claim. Plaintiff argued that the Plaintiff's § 1981 claim was not barred by Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), because Plaintiff's claim was premised upon the Defendants' offer for him to engage in a contract with racially discriminatory terms, not upon post-contractual conduct barred by Patterson. Plaintiff also argued that the District Court had abused its discretion in denying Plaintiff's Motion to Amend his Com-

plaint.[4] Finally, Plaintiff argued that the District Court erred in granting Defendants summary judgment as to the contract claim against GULF & WESTERN.

On April 17, 1992, a panel of the Eleventh Circuit Court of Appeals, after consideration of briefs filed by all parties, affirmed the District Court's judgment without issuing an opinion.

On May 6, 1992, Plaintiff then filed a Petition for Rehearing and Suggestion of Rehearing En Banc in the Eleventh Circuit Court of Appeals. This Petition was de-

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[4] Plaintiff appealed this issue to the Eleventh Circuit Court of Appeal, claiming that the District Court had abused is discretion in denying his Motion for Leave to Amend. The Eleventh Circuit affirmed the District Court's decision.

Plaintiff's Petition for Writ of Certiorari does not set forth any reason why the District Court's ruling and the Eleventh Circuit's ruling on this matter should once again be reviewed. Because Plaintiff does not ask this Court to review this matter, the only complaint before this Court is the Amended Complaint filed September 14, 1984.

nied, and the Court entered its final Mandate. Thereafter, the Plaintiff filed a Motion to Recall the Mandate entered by the Eleventh Circuit Court of Appeals and a Motion to Stay the Proceedings pending his Petition for Writ of Certiorari to the United States Supreme Court. Plaintiff's Motion to Recall the Mandate and Stay the Proceedings was denied on October 6, 1992.

SUMMARY OF ARGUMENT

POINT I

This Court does not consider arguments not presented in the lower courts absent exceptional circumstances. Certiorari should be denied because the Petitioner never argued in the proceedings below that Patterson v. McLean Credit Union should not apply to this case relief was unavailable to him under Title VII. Defendant never afforded the lower courts the opportunity to consider whether Patterson applies to instances where relief is unavailable under Title VII. In fact, Petitioner has never made any showing that relief is not available to him under Title VII. By denying the lower courts the opportunity to consider these issues, Petitioner has waived his right to raise these issues now in the Supreme Court of the United States.

POINT II

Certiorari should be denied because Petitioner has never pled, argued or even suggested to the lower courts that he had a cause of action under the Civil Rights Act of 1991.

There was never any claim made by Plaintiff in his Complaint pursuant to the Civil Rights Act of 1991, nor was the Act's passage by Congress ever envisioned by the parties to this cause at the time of the alleged events in 1980, or during eight years of proceedings. Summary judgment had been entered in favor of the Defendants prior to the enactment of the Act. Application of the Civil Rights Act of 1991 to events that occurred over a decade prior to its existence would be patently unjust.

POINT III

Certiorari should be denied because Petitioner's argument that Patterson v.

McLean Credit Union does not apply to this case because relief is unavailable under Title VII is without merit and does not warrant this Court's consideration. This Court has specifically stated that § 1981 protects two rights: The same right to make contracts and the same right to enforce contracts. These rights do not extent, as a matter of either logic or semantics, to conduct after the contact relation has been established, such as the retaliatory termination claim alleged in Plaintiff's Complaint.

POINT IV

Certiorari should be denied because summary judgment in favor of the Defendants on the § 1981 claim can be affirmed on several alternate grounds. First, Plaintiff failed to present a prima facie case by failing to produce any evidence that the "BWI" contract workers were discriminated against due to the flat fee

billing arrangement. Second, the Defendants have articulated legitimate, non-discriminatory reasons for their actions in 1980. Finally, because neither RISK nor HALL had anything to do with the contract terms or renewal between the Plaintiff and GULF & WESTERN, there is simply no claim against either of these Defendants. Absolutely no reason exists to continue RISK and HALL's participation in this matter.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUES THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.

The Court has consistently held that, absent exceptional circumstances, it will not address a question not raised in the Courts below. Adickes v. S. H. Kress & Company, 90 S.Ct. 1598, 1602, n.2 (1970); Rogers v. Lodge, 102 S.Ct. 3272, 3281 (1982); EEOC v. Federal Labor Relations Authority, 106 S.Ct. 1678, 1681 (1986); FTC v. Groiler, Inc., 103 S.Ct. 2209, 2212, n.6 (1983); Lawn v. United States, 78 S.Ct. 311, 324, n.16 (1958). In Duignan v. United States, 47 S.Ct. 566, 568 (1927), this Court stated that it "sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not presented or passed upon below are reviewed."

The Petitioner did not raise any of the arguments contained in his Petition for Writ of Certiorari in the courts below. Therefore, these arguments were not properly preserved and should not be considered by this Court in the first instance.

In District Courts, Defendants filed their Motions for Summary Judgment based on, among other grounds, the fact that Plaintiff's § 1981 claim was based upon post-contractual conduct, and therefore barred by Patterson v. McLean Credit Union. Specifically, Defendants pointed out that Plaintiff claimed that he was fired in retaliation for his refusal to discriminate against black alien workers. Defendants argued, and the Court agreed, that there is no cause of action under § 1981 for such post-contractual activity, as was held by this Court in Patterson v. McLean Credit Union.

Plaintiff argued that his claim was not based upon post-contractual activity; he argued that instead, his claim was based upon Defendants' refusal to form a new contract with him (R8-268, R13-358, pp. 29-35), and that his claim was therefore based upon conduct relating to his right to make and enforce a contract.

In Plaintiff's responses to Defendants' Motions for Summary Judgment, Plaintiff never argued the issue that he now asks this Court to consider -- that Patterson v. McLean Credit Union should not bar his § 1981 claim because Patterson should not apply to cases where relief is unavailable under Title VII. (R8-268; R13-359).

Plaintiff reiterated the same arguments that he made in the District Court in his Appellate Brief filed with the United States Court of Appeals for the Eleventh Circuit. Again, he did not press

the issue now before the Court. In fact, the only reference to Title VII made by the Plaintiff in his entire 30-page Brief filed with the Eleventh Circuit Court of Appeals occurred when Plaintiff, after advancing his arguments as to why Plaintiff's claim should not be barred by Patterson, stated, "It should also be noted that neither of these theories would fall within the scope of Title VII." (Appellant's Brief, P. 17). No explanation of this statement followed and this argument was not presented orally.

It is also important to note that Plaintiff merely assumes that he has no cause of action under Title VII, when there has never been any discussion of this matter in the courts below. Although Plaintiff assumes that no Title VII action could have arisen from Plaintiff's "non-employee" relationship with Defendants, Title VII does not require a common-law

employment relationship and does apply to physicians in private practice. Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988); Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1982); Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986); Mousari v. Beebe Hospital of Sussex County, Inc., 674 F.Supp. 145 (D. Dela. 1987).

The first time that Plaintiff presented his argument that Patterson should not apply to this case because relief was unavailable to him under Title VII was in his Petition for Rehearing filed after the Eleventh Circuit had affirmed the District Court's decision. This Court has held that issues raised for the first time in a petition for rehearing are claimed too late. Texas & P.Ry. Co. v. Southern Pac. Ry. Co., 11 S.Ct. 10, 12 (1890).

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.

Plaintiff's Amended Complaint was filed in 1984. The Complaint attempted to state a cause of action under 42 U.S.C. § 1981. The claim was based upon events that occurred in 1979 and 1980, more than a decade prior to the adoption of the Civil Rights Act of 1991.

Litigation of this case proceeded for six and one-half years in the District Court. The District Court entered summary judgment in favor of the Defendants on November 30, 1990, almost one year prior to the adoption of the Civil Rights Act of 1991.

Because the parties never envisioned the adoption of the Civil Rights Act of 1991, Plaintiff never pled a cause of action pursuant to that Act in his Complaint. Obviously, the application of the

Civil Rights Act of 1991 to this case was never considered by the parties or by the District Court.

Petitioner appealed this case to the United States Court of Appeals for the Eleventh Circuit, again claiming that his Amended Complaint stated a cause of action solely under § 1981. Plaintiff's Brief was filed with the United States Court of Appeals for the Eleventh Circuit prior to the enactment of the Civil Rights Act of 1991. However, the Civil Rights Act of 1991 became effective on November 21, 1991, before the Court of Appeals had rendered its decisions in this case. Plaintiff never attempted to bring this issue to the Court's by filing a citation of supplemental authorities, as permitted by Rule 28(J) of the Federal Rules of Appellate Procedure, or by oral argument held before a panel of the Appellate Court, any time between the enactment of the Civil

Rights Act of 1991 in November, 1991, and the issuance of that court's Judgment on April 17, 1992.

After the United States Court of Appeal for the Eleventh Circuit affirmed the District Court's ruling, finding that Plaintiff did not state a cause of action under § 1981, Plaintiff filed a Motion for Rehearing and Suggestion for Rehearing En Banc on May 6, 1992. Once again, Petitioner never even suggested the possible application of the Civil Rights Act of 1991 to this case.

Thus, the very first appearance of this issue is now before the Court. Petitioner asks this Court to consider applying a statute under which relief has never been pled, argued or sought at any time during the eight years of proceedings in the courts below. The application of a statute to events which occurred more than a decade prior to its enactment, and to a

case where summary judgment had been entered in favor of Defendants prior to the adoption of the statute, is patently unjust. The Petitioner has never made a claim pursuant to the Civil Rights Act of 1991, and, therefore, there was no reason, and there still is no reason, for this Court to consider this issue.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IS WITHOUT MERIT.

This Court recognized in Patterson that, "The most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the making and enforcement of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." 109 S.Ct. 2363 (1989).

Petitioner argues that if he has no claim under Title VII, the Court should somehow interpret § 1981 to provide him with a cause of action. However, by its plain terms, the relevant provision in § 1981 protects two specific rights: the same right to make contracts and the same right to enforce contracts. These rights do not extend, as a matter of either logic or semantics, to conduct after the con-

tract relation has been established, such as the retaliatory termination claim alleged in Plaintiff's Complaint. It simply does not follow that because a Plaintiff has no claim under one statute that he must have a claim under another. Section 1981 clearly indicates that Congress intended to protect a limited category of rights when it adopted the statute. These rights were not expanded until the adoption of the Civil Rights Act of 1991.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFFIRMED ON SEVERAL OTHER DISPOSITIVE GROUNDS.

Any ground properly raised in the courts below may be urged in the United States Supreme Court as a basis for affirmance of the Court of Appeals' decision. Whitley v. Albers, 106 S.Ct. 1078, 1087 (1986); United States v. New York Telephone Co., 98 S.Ct. 364, 369, n.8 (1977). Because there are various alternate grounds for affirmance of the lower court's decision, it is unnecessary to decide any of the questions presented in the Petition for Writ of Certiorari.

A. PLAINTIFF FAILED TO PRESENT A PRIMA FACIE CASE.

First, in order to establish a § 1981 claim, intentional discrimination must be shown. General Building Contractor's Association v. Pennsylvania, 102 S.Ct. 3141 (1982). While merely "different" treat-

ment is not enough to establish a prima facie case, it is an indispensable element of one. It must be shown that the group allegedly subjected to unlawful discrimination was treated differently than similarly-situated employees who are not members of that group. Clark v. Huntsville, 717 F.2d 525 (11th Cir. 1983); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1312 (7th Cir. 1985), Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985).

It is undisputed that Plaintiff billed for his treatment of contract workers (BWI's) on a flat fee agreement for fourteen years (R3-77, pp. 46-46, 54-55). He testified that he always rendered the same good quality of medical care to all workers, regardless of the fee schedule, as he was expected to do so by GULF & WESTERN. (R7-245, para. 4, R3-77, pp. 39, 53, 61, 63, 66; R6-234, p. 120; R6-232,

pp. 44, 67). In fact, Plaintiff testified that the BWI contract workers were treated "the same as the bank president." (R6-234, p. 120). In addition, Plaintiff testified that when the contract fee agreement was in effect, the rate structure was not based on race or alienage. (r7-246 PARA. IV(D)(6); R3-77, pp. 60-63, 108-109). The employer was billed at the same rate for blacks and whites. Billing for treatment of a Jamaican or other alien worker was the same as for domestic workers, except for BWI contract workers who were seen in large numbers during a short season. Since the differing rate structure was not based on race or alienage, and resulted in identical care, there was no unlawful intentional discrimination under the contract, and no prima facie case of a § 1981 claim.

B. ARTICULATED LEGITIMATE, NONDISCRIMINATORY REASONS EXIST FOR THE ACTIONS.

Despite Plaintiff's failure to pres-

ent a prima facie case, the record is replete with articulated and supported legitimate, nondiscriminatory reasons for the dismissal. First, it is undisputed that the Plaintiff was under suspicion of bill-padding. (R7-241, para. 12; R8-254, para. 7; R7-239, paras. 4-5). In addition, the Plaintiff himself admitted giving money to RISK's claims adjuster, Palmer Pierce, the very person who approved his bills. (R8-254, para. 9). In the District Court's Order granting summary judgment for Defendants, the court noted that, ". . . Plaintiff made undocumented loans to the claims supervisor which provided cause for termination." Finally, it was undisputed that in 1980, GULF & WESTERN's worker's compensation program underwent a total reorganization which resulted from an audit which was critical of RISK's efficiency, and from a concern about the overall effectiveness of the program ad-

ministration. (R8-254, para. 10). Plaintiff has offered no evidence to show that the above-stated reasons were merely a pretext for intentional discrimination.

C. NEITHER RISK NOR HALL PARTICIPATED IN THE DECISION TO TERMINATE PLAINTIFF.

Finally, the Plaintiff's claim against Defendants, RISK and HALL, is that somehow RISK and HALL caused him damage because they attempted to get him to go along with some racially-discriminatory scheme which violated 42 U.S.C. 1981.[5] Yet there has never been any evidence in the record to support this claim against these Defendants.

There is no "contract" claim against Defendants, RISK or HALL, because there was no contract between Plaintiff and these Defendants. Furthermore, RISK and

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[5] Plaintiff moved to amend his Complaint on September 21, 1990, to include a conspiracy claim against RISK and HALL, but the motion was denied. Clearly this is an admission by Petitioner that no claims existed against RISK and HALL.

HALL had nothing to do with any contract terms or renewal between Plaintiff and GULF & WESTERN after January 1, 1979. Risk was simply the claims administrator for GULF & WESTERN.

Neither RISK nor HALL had any duty to select the "company doctor" for GULF & WESTERN in 1980. (R8-256, para. 2). Because RISK was terminated at the same time as Plaintiff by GULF & WESTERN, RISK was not involved in the termination of any alleged contract of Plaintiff, nor in the retention of Dr. Ramos as his replacement. As Plaintiff has freely admitted, GULF & WESTERN discovered that Plaintiff had loaned RISK's Palmer Pierce four thousand ($4,000.00) dollars (the very person approving his bills). The decision was then made by GULF & WESTERN to get rid of both claims administrator and the doctor.

There is simply no evidence that RISK had anything to do with Plaintiff's termi-

nation or the decision not to renew his services in 1980. As the District Court held in its Order Granting Final Summary Judgment, the Plaintiff's undocumented loans to RISK's claims supervisor provided cause for termination, a decision made solely by GULF & WESTERN.

RISK was a separate wholly-owned subsidiary of Frank B. Hall & Co., Inc. There was no evidence of any direct involvement in any way of the personnel of Hall. There was no evidence supporting any claim against Hall, and even if there were, it would only be derivative of RISK.

Absolutely no reason exists to continue RISK and HALL's participation in this matter.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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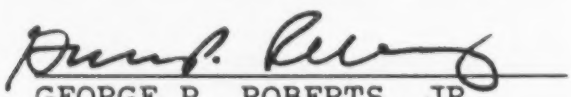
By: 
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I HEREBY CERTIFY that a true copy of the foregoing has been furnished to ALL COUNSEL ON ATTACHED LIST, by U.S. mail, this 26th day of October, 1992.

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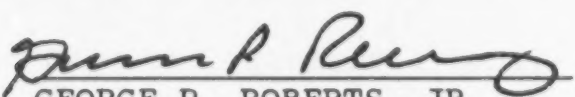
By: 
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NO. 92-552

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

v.

GULF + WESTERN INDUSTRIES, INC.,
GULF + WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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14 pp

QUESTIONS PRESENTED

A. Whether Respondents Can Dispute Facts When the Court Below Granted Summary Judgment Based Upon an Erroneous View of the Law?

B. Whether this Court Should Resolve the Split Among the Courts of Appeals Regarding the Retroactive Application of the Civil Rights Act of 1991?

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES iii

REPLY TO BRIEFS IN OPPOSITION. . . . 1

I. RESPONDENTS SHOULD NOT NOW BE ALLOWED TO ARGUE FACTUAL QUESTIONS WHICH MUST BE RESOLVED AGAINST THEM ON A MOTION FOR SUMMARY JUDGMENT . . 1

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS REGARDING THE RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991. 3

A. This Court Has the Power to Decide the Issue of Retroactive Application, Even Though it Was Not Presented Below. 3

B. There is Clearly a Split Among the Courts of Appeals on the Issue of the Retroactive Application of the Civil Rights Act of 1991. 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES PAGE

Arcadia, Ohio v. Ohio Power Co.,
498 U.S. 73, 111 S.Ct. 415 (1990). 5

Baynes v. A T & T
Technologies, Inc.,
976 F.2d 1370 (11th Cir. 1992) . .7,8

Blonder-Tongue Laboratories, Inc.
v. Univ. of Ill. Found.,
402 U.S. 313 (1971). 5

Capital Cities Cable, Inc.
v. Crisp,
467 U.S. 691 (1984). 3,4,5

Carlson v. Green,
446 U.S. 14 (1980) 4

City of Springfield, Mass.
v. Kibbe,
480 U.S. 257 (1987). 4

Cuyler v. Sullivan,
466 U.S. 335 (1980). 3

Davis v. City and County of
San Francisco,
976 F.2d 1536 (9th Cir. 1992). . . 8

Fray v. Omaha World Herald Co.,
960 F.2d 1370 (8th Cir. 1992). . . 8

Matsushita Elec. Indus. Co.
v. Zenith Radio Corp.,
475 U.S. 574 (1986). 1

TABLE OF AUTHORITIES
(continued)

CASES PAGE

McCleskey v. Zant,
499 U.S. ---, 111 S.Ct. 1454,
113 L.Ed.2d 517 (1991) 5

Mozee v. American Commercial
Marine Serv. Co.,
963 F.2d 929 (7th Cir. 1992) . . . 8

United States v. Diebold, Inc.,
369 U.S. 654, 655 (1962) 2

Vance v. Terrazas,
444 U.S. 252 (1980). 5

Vogel v. City of Cincinnati,
959 F.2d 594 (6th Cir. 1992) . . . 8

Youakim v. Miller,
425 U.S. 231 (1976). 4

TREATISES

1 S. CHILDRESS & M. DAVIS,
FEDERAL STANDARDS OF REVIEW
(2d edn. 1992) 2

R. STERN, E. GRESSMAN &
S. SHAPIRO,
SUPREME COURT PRACTICE
(6th edn. 1986). 5,6

REPLY TO BRIEFS IN OPPOSITION

I. RESPONDENTS SHOULD NOT NOW BE ALLOWED TO ARGUE FACTUAL QUESTIONS WHICH MUST BE RESOLVED AGAINST THEM ON A MOTION FOR SUMMARY JUDGMENT

Respondents Gulf + Western Industries, Inc. and Gulf + Western Food Products, Co. devote much of their Brief in Opposition to re-urging factual differences among the parties. Not only is such argument immaterial; it is unnecessarily inflammatory and does little to help this Court decide whether to exercise jurisdiction over the difficult issues presented in the Petition.

It is well-established that on a motion for summary judgment, the district court must resolve any disputed issues of material fact in favor of the non-movant. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

587-88 (1986), citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Appellate review of grants of summary judgment employ the same standard. That is, a reviewing court's standard of review is de novo. See generally 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW § 5.02 nn. 9-11 (2d edn. 1992) (collecting cases).

Thus, Gulf + Western is patently incorrect, insofar as summary judgment is involved, when it argues that "it is the province of the courts below to determine the existence of disputed material issues rather than the traditional role of this Court on certiorari." See Gulf + Western Brief in Opposition at 3.

This Court should apply the traditional de novo standard, and resolve all disputed material facts in

favor of Respondent Dr. Baker. In so doing, this Court should disregard the immaterial assertions upon which Gulf + Western relies so heavily. See, e.g., Gulf + Western Brief in Opposition at 3 ("Perceived Misstatements of Fact"). All those "misstatements" must be resolved in favor of Dr. Baker -- the non-movant below.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS REGARDING THE RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991

A. This Court Has the Power to Decide the Issue of Retroactive Application, Even Though it Was Not Presented Below

It is clear that this Court may consider questions which have not been raised below. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697 (1984); Cuyler v. Sullivan, 466 U.S. 335 (1980);

Youakim v. Miller, 425 U.S. 231, 234 (1976). Although this Court generally declines to decide issues not presented below, that rule is prudential only; there is no jurisdictional bar to this Court reaching them. City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 259 (1987). See also Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).

Furthermore, the rule is not inflexible. Capital Cities, 467 U.S. at 697. This Court has not hesitated to address issues not passed upon below, especially when, as is the case here, an important question is involved and "the issue is squarely presented and fully briefed." Carlson, 466 U.S. at 17 n.2.

Even when an issue has not been discussed in the petition for certiorari, this Court has reserved the power to address the new issue in

appropriate circumstances. See, e.g., McCleskey v. Zant, 499 U.S. ---, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73, ---, 111 S.Ct. 415, 418 (1990); Capital Cities, 467 U.S. at 697-98; Vance v. Terrazas, 444 U.S. 252, 258 n.5 (1980); Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 319-21 (1971). See generally R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 6.26 (6th edn. 1986).

Cases presenting "appropriate circumstances" have generally involved one or more of the following factors: (1) origination in federal court as opposed to state court; (2) interpretation of federal law rather than state law; (3) the presence of sufficient facts in the Record to allow for a fair and intelligent decision on

the new issue; (4) the opportunity for opposing parties to present briefs on the new issue; and (5) the relevance of the new issue to an intelligent resolution of the case. See generally R. STERN, E. GRESSMAN & S. SHAPIRO, supra, §§ 3.24, 6.25, 6.26. All of the foregoing factors are present in this case. Thus, this Court should address the issue of the retroactivity of the Civil Rights Act of 1991.

Several other factors also weigh in favor of this Court's consideration of the retroactivity of that Act. Assertion of the issue below would be an exercise in futility; a decision by this Court on the merits will serve the interest of judicial administration. Remanding to the Eleventh Circuit would be futile. That court recently held that the Civil Rights Act of 1991

applies only prospectively. Baynes v. A T & T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992). Thus, any argument on this issue before the Eleventh Circuit would be futile for Petitioner; if this case were remanded, the Eleventh Circuit unquestionably would resolve the issue in favor of Respondents. Then, Petitioner could once again petition for certiorari. The interests of judicial economy clearly would be advanced by this Court's resolving the issue on its merits. Thus, granting certiorari at this time would avoid the enormous expense and delay that would occur if this case were merely remanded.

B. There is Clearly a Split Among the Courts of Appeals on the Issue of the Retroactive Application of the Civil Rights Act of 1991

Since the filing of the Petition in this action, the Ninth Circuit has held that the Civil Rights Act of 1991 is retroactive. Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992). Other Circuits have held that the Act is not retroactive. See Baynes, 976 F.2d 1370 (11th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).

Because of this clear split among the Courts of Appeal regarding the retroactivity of the Civil Rights Act of 1991, this Court should grant the

Petition in the instant action to resolve this important issue of federal law.

CONCLUSION

For the foregoing reasons and for the reasons contained in the Petition, this Court should issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit, and order full briefing and oral argument on the merits of this case.

Respectfully Submitted,

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